[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH AND ANOTHER . APPELLANTS;
DEFENDANTS,

AND

THE LIMERICK STEAMSHIP COMPANY LIMITED . . . . . } RESPONDENT.
PLAINTIFF,

THE COMMONWEALTH . . . . . APPELLANT;

AND

KIDMAN AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 7, 8, 10, 11, 14-16; *Dec.* 1.

Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.

Constitutional Law—High Court—Jurisdiction—Appeal from Supreme Court of State—Order of Supreme Court giving leave to appeal to Privy Council—Power of Commonwealth Parliament—Conferring Federal jurisdiction on State Courts—Taking away right of appeal to Privy Council—The Constitution (63 & 64 *Vict.* c. 12), *secs.* 73-79—*Judiciary Act* 1903-1920 (*No.* 6 *of* 1903—*No.* 38 *of* 1920), *secs.* 37, 38A, 39. 56—*Australian Courts Act* 1828 (9 *Geo.* IV. c. 83), *secs.* 15, 39—*Privy Council Appeal Act* 1844 (7 & 8 *Vict.* c. 69), *sec.* 1—*Order in Council of* 2*nd April* 1909, *rules* 2, 4, 5, 18, 28—*Charter of Justice*, 13*th October* 1823.

An action was brought in the Supreme Court of New South Wales against the Commonwealth and a private person for an alleged wrongful requisition of the plaintiff's ships, and a verdict given for the plaintiff was set aside by the Full Court. Pursuant to the Imperial Order in Council of 2nd April 1909, the Full Court made an order granting leave to the plaintiff to appeal to the Privy Council. The Full Court also, pursuant to the same Order in Council, made

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an order granting leave to appeal to the Privy Council from an order of the Full Court granting to the Commonwealth, pursuant to the *Arbitration Act* 1902 (N.S.W.), leave to enforce as a judgment an award in an arbitration between the Commonwealth and private persons as to the rights of the parties under a shipbuilding contract.

Held, by *Isaacs*, *Rich* and *Starke* JJ. (*Knox* C.J. and *Gavan Duffy* J. dissenting), that the order granting leave to appeal to the Privy Council in each case was an exercise of judicial power and was therefore an " order " within the meaning of sec. 73 of the Constitution, from which an appeal would lie to the High Court.

Held, also, by *Isaacs*, *Rich* and *Starke* JJ., that sec. 39 (2) (*a*) of the *Judiciary Act* 1903-1920, on its proper interpretation, has the effect of excluding an appeal as of right to the Privy Council from a decision of the Supreme Court exercising Federal jurisdiction, and of giving to the High Court jurisdiction to entertain an appeal from such a decision; that, so interpreted, sec. 39 (2) (*a*) is a valid exercise of the power conferred by sec. 77 (III.) of the Constitution; and therefore that, as the orders from which leave to appeal to the Privy Council had been granted were made by the Supreme Court in the exercise of Federal jurisdiction, the orders granting such leave were made without jurisdiction.

Webb v. *Outrim*, (1907) A.C. 81; 4 C.L.R. 356, distinguished.

Decision of the Supreme Court of New South Wales (Full Court): *Limerick Steamship Co.* v. *Commonwealth* and *Commonwealth* v. *Kidman*, (1924) 24 S.R. (N.S.W.) 145, reversed.

APPEALS from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by the Limerick Steamship Co. Ltd. against the Commonwealth and William Scott Fell trading as Scott Fell & Co., by which the plaintiff sought to recover £50,000 damages, alleging substantially, by the first of two counts, that the defendants had seized and taken the plaintiff's ships and had kept and used them for a long time, whereby the plaintiff was deprived of the use of the ships and was otherwise damnified; and, by the second count, that the Commonwealth, at the instance and instigation of the defendant Scott Fell, requisitioned the plaintiff's ships under the *Defence Act*, intending thereby to benefit the defendant Scott Fell and certain companies and to deprive the plaintiff of the use and possession of its ships without recompensing the plaintiff in the manner required by the *Defence Act*. The action was tried before a jury, which found a verdict for the plaintiff for £19,480.

On appeal the Full Court ordered that the verdict should be set aside and judgment entered for the defendants: *Limerick Steamship Co.* v. *Commonwealth* (1). On the application of the plaintiff the Full Court on 26th February 1924 made an order granting leave to the plaintiff to appeal to the Privy Council: *Limerick Steamship Co.* v. *Commonwealth* (2).

On 12th June 1922 an agreement was entered into between the Commonwealth, of the first part, and Sidney Kidman, Joseph Mayoh and Arthur Mayoh, of the second part, whereby certain disputes between the parties, arising out of certain ship-building contracts, were referred to arbitration. One of the terms of the agreement was that "the *Arbitration Act* 1902 of the State of New South Wales shall apply to proceedings in this arbitration but either party shall be at liberty to apply to the High Court in accordance with the provisions of sec. 33A of the *Judiciary Act* 1903-1920 for an order directing that the award shall be a rule of the said Court." On 30th June 1922 the arbitrator made his award. A motion by the parties of the second part to the Supreme Court to set aside the award or remit it back to the arbitrator was refused: *Kidman* v. *Commonwealth* (3). Subsequently the Commonwealth applied to the Supreme Court, pursuant to the *Arbitration Act* 1902, for leave to enforce the award in the same manner as a judgment of the Court, and such leave was given on 23rd November 1923: *Commonwealth* v. *Kidman* (4).

On the application of the parties of the second part, the Full Court on 26th February 1924 made an order granting leave to them to appeal to the Privy Council: *Commonwealth* v. *Kidman* (2).

From the orders of the Supreme Court granting leave to appeal to the Privy Council the Commonwealth and Scott Fell, in the one case, and the Commonwealth, in the other, now, by special leave, appealed to the High Court.

Other material facts appear in the judgments hereunder.

(1) (1923-24) 24 S.R. (N.S.W.) 214.
(2) (1924) 24 S.R. (N.S.W.) 145.
(3) (1923) 23 S.R. (N.S.W.) 329.
(4) (1923) 23 S.R. (N.S.W.) 590.

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Brissenden K.C. (with him *E. M. Mitchell* and *H. E. Manning*), for the Commonwealth, in the first appeal.

Brissenden K.C. (with him *E. M. Mitchell* and *Badham*), for the Commonwealth, in the second appeal.

Ralston, for the appellant Scott Fell, in the first appeal.

Innes K.C. (with him *Evatt*), for the respondent the Limerick Steamship Co., took a preliminary objection. The appeal is not competent because the order granting leave to appeal to the Privy Council is not an "order" from which under sec. 73 of the Constitution an appeal lies to the High Court. The Supreme Court in granting such leave acted under rule 2 (*a*) of the Imperial Order in Council of 2nd April 1909 and was for that purpose a delegate of the King in Council and on his behalf exercised the royal prerogative. From an order made in exercise of such a power no appeal lies, and it was not intended by sec. 73 of the Constitution to allow an appeal to the High Court from such an order. The judgments, decrees and orders to which sec. 73 relates are those made under the jurisdiction conferred upon the Supreme Court under the State Constitution and by the State Legislature. [Counsel referred to 9 Geo. IV. c. 83, sec. 15; *Privy Council Appeal Act* 1844 (7 & 8 Vict. c. 69), sec. 1; *In re Barbour* (1); *Perpetual Trustee Co.* v. *àBeckett* (2); *The Amstel* (3); *Kay* v. *Briggs* (4).] Orders made under the Order in Council are not judicial acts and are not subject to appeal at all (*Lane* v. *Esdaile* (5); *Ex parte Stevenson* (6)).

[ISAACS J. referred to *Pearson* v. *Russell* (7).]

It is immaterial that the Supreme Court in making the order from which leave to appeal was granted may have been exercising Federal jurisdiction. By an order made under the Order in Council the King has exercised his prerogative finally unless in his Privy Council he alters his mind. The remedy of a person aggrieved by a

(1) (1891) 12 N.S.W.L.R. (L.) 90.
(2) (1900) 17 N.S.W.W.N. 69.
(3) (1877) 2 P.D. 186.
(4) (1889) 22 Q.B.D. 343.
(5) (1891) A.C. 210.
(6) (1892) 1 Q.B. 394, 609.
(7) (1889) 15 V.L.R. 89; 10 A.L.T. 272.

refusal of leave to appeal under the Order in Council is an application to the Privy Council for special leave to appeal. If the leave has been improperly granted the Privy Council can rescind it. There can be no right of appeal to the High Court because the High Court has no power to do what the Supreme Court ought to have done.

[KNOX C.J. referred to *Ex parte Commissioners for Railways* (1); *Walker* v. *Walker* (2); *Dean* v. *Dawson* (3); *Allan* v. *Pratt* (4).

[STARKE J. referred to *Cayron* v. *Russell* (5).]

Maughan K.C. (with him *Holman* K.C. and *Betts*), for the respondents Kidman and Mayo, took the same objection, and also moved that the special leave to appeal should be rescinded. The Order in Council of 2nd April 1909 is a code as to the conditions under which litigants in the Supreme Court are to be allowed to appeal to the Privy Council. The question whether the order granting leave to appeal to the Privy Council is properly made is a matter entirely between the Supreme Court and the Privy Council. The nature of the rules in the Order in Council precludes any appeal except to the Privy Council itself (see *Wilson* v. *Callender* (6)).

Fullagar, for the State of Victoria, intervening. Under the Order in Council the King is himself allowing the appeal to be brought subject to certain conditions, and when it is allowed the litigant is in the same position as if special leave to appeal had been obtained from the Privy Council. As soon as the conditions are fulfilled the matter is in the Privy Council.

Brissenden K.C. The order granting leave to appeal to the Privy Council is a judicial order of the Supreme Court, and therefore comes within sec. 73 of the Constitution. The jurisdiction exercised by the Supreme Court was exercised under the laws of New South Wales, and was not part of the exercise of the royal prerogative. [Counsel referred to 4 Geo. IV. c. 96, secs. 15, 16; *Charter of Justice —New South Wales* (13th October 1823); 7 & 8 Vict. c. 69; 18 & 19 Vict. c. 54, sec. 1, Schedule; *Supreme Court Act* 1852

(1) (1899) 20 N.S.W.L.R. (Eq.) 28.
(2) (1903) A.C. 170.
(3) (1888) 9 N.S.W.L.R. (Eq.) 27.
(4) (1888) 13 App. Cas. 780.
(5) (1899) 24 V.L.R. 735; 20 A.L.T. 188.
(6) (1855) 9 Moo. P.C.C. 100.

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(Vict.) (15 Vict. No. 10), sec. 33; *Imperial Order in Council* of 9th June 1860 relating to appeals to the Privy Council from the Supreme Court of Victoria; *Randwick Borough* v. *Dangar* (1); *Gundagai Municipality* v. *Norton* (2).] The Order in Council merely added a new jurisdiction to that possessed by the Supreme Court. The fact that the High Court could not make the order which the Supreme Court should have made is not a ground for denying that an appeal lies to this Court, for power to make such an order is not a necessary attribute of an appellate Court (*Canadian Pacific Railway Co.* v. *Toronto Corporation* (3)). Under sec. 37 of the *Judiciary Act* the High Court has, in its appellate jurisdiction, full power to make an order granting leave to appeal to the Privy Council. On the construction of the Order in Council of 2nd April 1909, the Supreme Court is not referred to as a *persona designata*, but is the Supreme Court clothed with all its functions as the Supreme Court, and with the force of the Executive behind it to enforce its orders. The Order in Council is a "colonial law" within the definition in sec. 2 of the *Colonial Laws Validity Act* 1865; and if there is any repugnancy between it and the Constitution the latter will prevail. The Order in Council is not a complete code as to appeals to the Privy Council (*Morse* v. *Australian Steam Navigation Co.* (4); *Wavertree Sailing Ship Co.* v. *Love* (5)).

[Counsel also referred to *Colonial Sugar Refining Co.* v. *Irving* (6).]

Ralston adopted the arguments of *Brissenden* K.C.

Innes K.C., in reply.

Maughan K.C., in reply.

PER CURIAM. We will hear argument on the main question.

Brissenden K.C. The Supreme Court, in making the orders from which it granted leave to appeal to the Privy Council, was exercising Federal jurisdiction, since the Commonwealth was a party (secs. 75 (III.) and 77 (III.) of the Constitution; sec. 39 of the *Judiciary Act*).

(1) 1898) 19 N.S.W.L.R. (L.) 395.
(2) (1894) 19 N.S.W.L.R. (L.) 395 (n.).
(3) (1911) A.C. 461, at p. 471.
(4) (1870) 9 S.C.R. (N.S.W.) (L.) 81, at p. 82.
(5) (1895) 12 N.S.W.W.N. 62.
(6) (1904) S.R. (Q.) 18; (1905) A.C. 369, at p. 372.

The Order in Council does not apply to the Supreme Court when exercising Federal jurisdiction (see *Dalgarno* v. *Hannah* (1); *Colonial Sugar Refining Co.* v. *Irving* (2)). Sec. 39 (2) (*a*) of the *Judiciary Act* does not purport to affect the right of the Privy Council to grant special leave to appeal from the Supreme Court of a State exercising Federal jurisdiction, but it only takes away an appeal as of right to the Privy Council, including in the term "appeal as of right" the right given by the Order in Council to appeal to the Privy Council. The Parliament of the Commonwealth was entitled, when investing a Court of a State with Federal jurisdiction, to take away an appeal as of right to the Privy Council (*Cushing* v. *Dupuy* (3)). The words "shall be final and conclusive" do not affect or take away the right of the Sovereign to grant special leave to appeal to the Privy Council. The decision in *Webb* v. *Outrim* (4) did not touch the question of the validity of sec. 39 (2) (*a*) of the *Judiciary Act*. That decision was based on the assumption that the judgment under appeal was given by the Supreme Court in the exercise of its ordinary State jurisdiction, and there is no mention of Federal jurisdiction. All that was decided was that the Commonwealth Parliament could not take away the right to appeal to the Privy Council in a case in which the Supreme Court of a State was exercising its State jurisdiction. Even if *Webb* v. *Outrim* did decide that sec. 39 (2) (*a*) was invalid as applied to the Supreme Court exercising Federal jurisdiction, it is not binding on this Court. The question of the validity of sec. 39 (2) (*a*) is a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the States, as to which, under sec. 74 of the Constitution, the High Court is the final arbiter (*Jones* v. *Commonwealth Court of Conciliation and Arbitration* (5)). On the reasoning in *Lorenzo* v. *Carey* (6), sec. 39 (2) (*a*) is valid. [Counsel also referred to *Baxter* v. *Commissioners of Taxation (N.S.W.)* (7).]

Ralston. The Limerick Steamship Co. having sued Scott Fell together with the Commonwealth as joint tortfeasors, the whole action is in Federal jurisdiction.

(1) (1903) 1 C.L.R. 1, at p. 10.
(2) (1904) S.R. (Q.), at p. 31.
(3) (1880) 5 App. Cas. 409.
(4) (1907) A.C. 81; 4 C.L.R. 356.
(5) (1917) A.C. 528; 24 C.L.R. 396.
(6) (1921) 29 C.L.R. 243, at p. 249.
(7) (1907) 4 C.L.R. 1087, at p. 1143.

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Innes K.C. Even if the appeal is competent the Court should not entertain it and should rescind the special leave; for the Privy Council decided in *Webb* v. *Outrim* (1) that sec. 39 (2) (*a*) was invalid as applied to Federal jurisdiction, and this Court is bound by that decision. The Privy Council must have so decided, for the section is concerned only with Federal jurisdiction (see *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (2); *Lorenzo* v. *Carey* (3)). On its true interpretation sec. 39 (2) (*a*) does not apply to an action instituted against the Commonwealth in the Supreme Court of a State. Part IX. of the *Judiciary Act* is a complete code as to actions by and against the Commonwealth, including the necessary investiture of the Supreme Courts of the States with jurisdiction to entertain such actions and the rights of the litigants. On the principle *Generalia specialibus non derogant*, sec. 39 (2) (*a*) is not intended to deal with such actions. Sec. 39 (2) (*a*) can be given an exhaustive meaning without applying it to such actions. On its narrowest construction Part IX. of the *Judiciary Act* is a submission by the Commonwealth to the jurisdiction of the Supreme Courts. Secs. 56 and 64 of the *Judiciary Act* either create or declare the rights of litigants in such actions, and those rights are to be the same as in an action between subject and subject. [Counsel referred to *Jamieson* v. *Downie* (4).]

[ISAACS J. referred to *Commonwealth* v. *New South Wales* (5).]

Even if sec. 39 (2) (*a*) does apply to actions against the Commonwealth, on its true interpretation it was not intended by the Legislature to prevent any appeal to the Privy Council direct from the decision of the Supreme Courts of the States exercising Federal jurisdiction. The only operative words of sec. 39 (2) (*a*) are "shall be final and conclusive"; and those words, as is well known, are not sufficient to take away the right of appeal to the Privy Council (see *Cushing* v. *Dupuy* (6); *In re Barbour* (7); *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (8); *In re Wi Matua's Will* (9); *Minister for Lands* v. *Harrington* (10); *Goldring* v. *La Banque*

(1) (1907) A.C. 81; 4 C.L.R. 356.
(2) (1907) 4 C.L.R., at pp. 1138, 1141, 1143, 1162.
(3) (1921) 29 C.L.R., at pp. 252, 255.
(4) (1923) A.C. 691.
(5) (1923) 32 C.L.R. 200.
(6) (1880) 5 App. Cas. 409.
(7) (1891) 12 N.S.W.L.R. (L.) 90.
(8) (1907) 4 C.L.R., at p. 1163.
(9) (1908) A.C. 448.
(10) (1899) A.C. 408.

d'Hochelaga (1); *Garnsey* v. *Flood* (2)). If those words are insufficient to destroy the prerogative of granting leave to appeal to the Privy Council, still less are they sufficient to destroy the vested right of a litigant to appeal when the prerogative has been exercised. The words "except so far as an appeal may be brought to the High Court" are an exception to the effect of the words "shall be final and conclusive," and are used to make it clear that Parliament did not intend to destroy the right of appeal to the High Court given by sec. 73 of the Constitution. The effect of sec. 39 (2) (*a*) is to establish beyond doubt that there is alternative appeal either to the High Court or to the Privy Council. Sec. 39 (2) (*a*) is invalid in so far as it purports or attempts, in all cases where the Supreme Court of a State is exercising Federal jurisdiction, to prevent an appeal, either as of right or at the discretion of the Supreme Court, direct to the Privy Council; for it is in conflict with Imperial legislation conferring the right of appeal and is not authorized by the Constitution. Secs. 73 and 74 of the Constitution are a code as to appeal from the Supreme Courts to the High Court, and they contain no mention of appeals from the Supreme Court to the Privy Council. Power to exclude appeals from the Supreme Courts to the Privy Council cannot be derived from sec. 77 (II.) of the Constitution, for the "Federal Court" there referred to is one of the Courts created by the Federal Parliament and not the High Court. Sec. 39 (2) was enacted, not under sec. 77 (II.), but under sec. 77 (III.) of the Constitution, and the Courts of the States which are thereby invested with Federal jurisdiction must be taken as they are found—in the case of the Supreme Courts of the States, with the right of appeal to the Privy Council. The Order in Council of 2nd April 1909 on its construction applies to decisions of the Supreme Court exercising Federal as well as State jurisdiction. The Order in Council was made after sec. 39 (2) (*a*) was enacted and when the decision in *Webb* v. *Outrim* (3) and the subsequent discussions of that decision were well known; and, if it had been intended to restrict the Order in Council to State jurisdiction, that intention would have been expressed (see *Baxter* v. *Commissioners of Taxation (N.S.W.)* (4)). Sec. 39 (2) (*a*) is not a necessary part of the investiture

(1) (1880) 5 App. Cas. 371.
(2) (1898) A.C. 687.
(3) (1907) A.C. 81; 4 C.L.R. 356.
(4) (1907) 4 C.L.R., at p. 1101.

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of the Courts of the States with Federal jurisdiction, for it is not a condition or restriction on such investiture, but something additional (*Lorenzo* v. *Carey* (1); *Troy* v. *Wrigglesworth* (2)). The right given by the Order in Council is given by Imperial legislation, and cannot be taken away except by Imperial legislation or legislation under the authority of an Imperial Act. The question whether the right of appeal to the Privy Council has been taken away by sec. 39 (2) (*a*) is not a question of the limits *inter se* of the constitutional powers of the Commonwealth and the States: it is a question of a conflict between Commonwealth legislation and Imperial legislation. Before there can be an *inter se* question there must be a field of legislative or other powers in relation to a certain matter, which field is divided between the Commonwealth and the States (*Jones* v. *Commonwealth Court of Conciliation and Arbitration* (3)).

Maughan K.C. The question raised by the motion to make the award a rule of Court was not an *inter se* question: it was a question of the powers of the King in Council on the one hand and of the Commonwealth Parliament on the other. Because the Supreme Court adjudicated upon that question, it did not become an *inter se* question. Neither the Legislature nor the Executive nor the Judiciary of New South Wales has control over the Order in Council. If this is not an *inter se* question, the case is governed by *Webb* v. *Outrim* (4), which decides that in all matters of Federal jurisdiction there is an appeal as of right from the Supreme Court to the Privy Council (*Anson on the Constitution*, 3rd ed., vol. II., p. 290). The decision in that case was right. There is no authority in the Constitution which enables the Commonwealth Parliament, in conferring Federal jurisdiction on the Supreme Courts of the States, to interfere with the internal administration of the Supreme Courts. Sec. 39 (1) of the *Judiciary Act* does not take away the jurisdiction of the Supreme Courts in matters as to which the High Court was given jurisdiction, because of the exception "except as provided in this section." That exception keeps out of sub-sec. 1 all the matters in sub-sec. 2. Special leave to appeal should be rescinded. An order allowing an

(1) (1921) 29 C.L.R., at pp. 255, 256.
(2) (1919) 26 C.L.R. 305, at p. 310.
(3) (1917) A.C., at p. 532; 24 C.L.R., at p. 398.
(4) (1907) A.C. 81; 4 C.L.R. 356.

appeal to another Court should not be the subject of an appeal to the High Court.

Fullagar. There is no reason why as a matter of construction the Order in Council of 2nd April 1909 should not apply to cases in which the Supreme Court is exercising Federal jurisdiction. The ultimate source of the jurisdiction of the Supreme Court is Imperial legislation and there is no reason for making a distinction between the channels through which the jurisdiction comes. Sec. 39 (2) (*a*) of the *Judiciary Act* purports to take away the right to appeal to the Privy Council whether statutory or under the Orders in Council. No such power can be found in the Constitution. If the power conferred by sec. 77 of the Constitution was wide enough to authorize sec. 39 (2) (*a*), then sec. 79 of the Constitution was not necessary. The conferring of power to take away the right of appeal to the Privy Council requires express words or necessary implication (*Webb* v. *Outrim* (1); *Attorney-General* v. *Sillem* (2); *Oram* v. *Brearey* (3)). The Constitution has done nothing to derogate from 9 Geo. IV. c. 83 or the Orders in Council made under it. Sec. 39 as a whole is invalid on the grounds raised in *Lorenzo* v. *Carey* (4).

Brissenden K.C., in reply, referred to *Salt* v. *Cooper* (5); *Ah Yick* v. *Lehmert* (6); *Lefroy's Legislative Power in Canada*, p. 510; *Valin* v. *Langlois* (7); *McCawley* v. *The King* (8).

Cur. adv. vult.

The following written judgments were delivered :—

Dec. 1.

KNOX C.J. AND GAVAN DUFFY J. These appeals were argued together and may be disposed of together. In the one case, the Supreme Court of New South Wales, exercising Federal jurisdiction, made an order granting leave to enforce, in the same manner as a judgment, an arbitration award; and in the other, exercising the

(1) (1907) A.C., at p. 91; 4 C.L.R., at p. 361.
(2) (1864) 10 H.L.C. 704, at p. 724.
(3) (1877) 2 Ex. D. 346.
(4) (1921) 29 C.L.R. 243.
(5) (1880) 16 Ch. D. 544, at p. 550.
(6) (1905) 2 C.L.R. 593, at p. 600.
(7) (1879) 5 App. Cas. 115, at pp. 118, 120.
(8) (1918) 26 C.L.R. 9, at p. 52.

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same jurisdiction, it directed judgment to be entered for the defendants in the action. It is unnecessary further to discuss the questions then at issue between the parties, for it was specifically stated by counsel that, though the jurisdiction then exercised by the Supreme Court was Federal, it was so only because the Commonwealth was a party in both proceedings. The unsuccessful parties in each case obtained from the Supreme Court conditional leave to appeal to the Privy Council under the provisions of the Order in Council of 2nd April 1909. The present appellants thereupon obtained from this Court leave to appeal and appealed against the orders of the Supreme Court. Two questions then arose for our consideration—first, whether the appeals to this Court were competent and, second, if so, whether the Supreme Court was right in giving leave to appeal to the Privy Council. With respect to the first question it was said for the appellants that the orders granting leave to appeal to the Privy Council were within the provisions of sec. 73 (II.) of the Constitution, which, among other things, gives the High Court jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of any Court exercising Federal jurisdiction, or of the Supreme Court of any State. For the respondents it was urged that sec. 73 applied only to judgments and orders made in the exercise of judicial jurisdiction and that the orders giving leave to appeal to the Privy Council were not so made, but were ministerial acts, and that the Supreme Court in making them was merely acting as agent or surrogate for His Majesty in Council. It was also said that even if the orders appealed against were judicial in their nature it was impossible to suppose that the British Legislature in enacting sec. 73 of the Constitution had intended to extend its provisions to such orders, and so interpose between the Supreme Court and the Privy Council the authority of another Court in a matter relating solely to appeal from the Supreme Court to the Privy Council. With respect to the second question the appellants urged that the Order in Council in terms applied only to judgments of the Supreme Court acting in its ordinary and not in a Federal jurisdiction, and that even if in terms it applied to Federal jurisdiction it was inconsistent with and must give way to the provisions of sec. 39 (2) (*a*)

of the *Judiciary Act*, which itself was authorized by Chapter III. of the Constitution. To this the respondents replied that the Federal jurisdiction which had been exercised by the Supreme Court had been conferred not by sec. 39 but by Part IX. of the *Judiciary Act*, and so was not subject to the conditions contained in sec. 39, and that, in any case, the Privy Council in *Webb* v. *Outrim* (1) had already decided that sec. 39 (2) (*a*), so far as it purported to take away the right to appeal to the Privy Council, was invalid. On this the appellants rejoined that the question of the validity of sec. 39 (2) (*a*) and of any antinomy between it and the Orders in Council constituted a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of a State within the meaning of sec. 74 of the Constitution, that in determining it this Court must express its own opinion and was not bound by the opinion of the Privy Council, and that the decision of the Privy Council in *Webb* v. *Outrim*, so far as it declared any part of sec. 39 (2) (*a*) to be invalid, should not be followed.

In our opinion no question arises in this case as to the constitutional powers of New South Wales. The Imperial statute 9 Geo. IV. c. 83, sec. 15, enacts that "It shall . . . be lawful for His Majesty, . . . by any Order or Orders of His Majesty in Council, to allow any person or persons feeling aggrieved by any judgment, decree, order, or sentence of the" Supreme Court of New South Wales "to appeal therefrom to His Majesty in Council, in such manner, within such time, and under and subject to such rules, regulations, and limitations, as His Majesty by any such . . . Order or Orders in Council . . . shall appoint and prescribe." Its provisions do not authorize the King to affect the Constitution of the State of New South Wales with respect to its Supreme Court or in any other way; nor does the Order in Council purport so to affect it. It authorizes the Supreme Court to act, not as an organ of the State, but as the representative of the King in Council. The constitutional powers of the State of New South Wales remained precisely the same after the Order in Council as they were before, and so did the functions of the Supreme Court under those constitutional powers. The Supreme Court of the State acts as an

(1) (1907) A.C. 81; 4 C.L.R. 356.

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organ of the State up to judgment and the enforcement of judgment, but, as the law now stands in New South Wales, it does not act as the organ of the State in any part of the procedure prescribed by the Order in Council. In our opinion the Privy Council in *Webb* v. *Outrim* (1) definitely decided that the provisions of sec. 39 (2) (*a*) were invalid in so far as they purported to take away appeal to the Privy Council from the Supreme Court of a State when exercising a jurisdiction which has been taken away by sec. 39 and then restored by that section. The appellants contend that the jurisdiction exercised by the Supreme Court in the proceedings from which appeal is sought to the Privy Council was such a jurisdiction, and rely on sec. 39 (2) (*a*) as taking away the appeal from the Privy Council and giving it to this Court. In the circumstances it is unnecessary to determine whether the jurisdiction exercised by the Supreme Court in the original proceedings was conferred by sec. 39 or not, because appeal to the Privy Council is taken away only in respect of jurisdiction so conferred. We think that the words of the Order in Council cannot be read so as to limit appeals to the case of jurisdiction other than Federal jurisdiction, and the appeal to the Privy Council is therefore competent if not taken away by sec. 39. In our opinion the proper course for us to follow is to rescind the leave to appeal in each case. If the appeal to the Privy Council proceeds, all the points discussed before us will be open to discussion before that tribunal, and it will be in a position to state the true meaning of the decision in *Webb* v. *Outrim*, and to reconsider the questions there debated if it thinks fit to do so.

ISAACS AND RICH JJ. These are appeals by special leave of this Court, and they have been ably and elaborately argued on both sides. The questions involved go far to test the extent of the Australian Commonwealth Constitution, and, indeed, taking into account some of the arguments, the extent of the State Constitutions also as instruments of self-government. They further concern the power of the supreme judicial organ of a State to order that the rights and liabilities, *including governmental powers and rights*, of the Commonwealth shall, contrary to the express legislation of the

(1) (1907) A.C. 81; 4 C.L.R. 356.

Commonwealth Parliament, be finally determined otherwise than by the High Court of Australia. It is plain, therefore, that the questions raised require this Court, which has been called mediately or immediately into existence by the Commonwealth Constitution for, among other objects, the very special purpose of interpreting it and, in case of dispute, of finally adjusting the relative constitutional powers of Commonwealth and States, to examine and weigh the opposing contentions with all possible care.

The Commonwealth and the appellant Scott Fell, resting his position on that of the Commonwealth, are appealing against conditional orders of the Supreme Court of New South Wales, dated 26th February 1924, granting leave to the respondents to appeal to His Majesty in Council from judgments of that Court respectively rendered in an action, No. 2806 of 1920, and in an application under the *Arbitration Act* 1902 of New South Wales. The ground of appeal is, not some defect or error or some improper exercise of discretion in the course of making those orders, but that there was no jurisdiction to make such orders at all. The orders now appealed from were made by the Supreme Court under the Imperial Order in Council of 2nd April 1909 relating to appeals to His Majesty in Council.

It should be stated *in limine*, to prevent any misapprehension, that nothing in this appeal concerns the right of the Supreme Court to make such an order granting leave to appeal in all cases where that Court determines a matter exclusively as the Supreme Court of New South Wales exercising State judicial power—that is to say, where no Federal jurisdiction is involved, and where, consequently, the State Court is not in any way exercising what sec. 71 of the Constitution calls "the judicial power of the Commonwealth." Nor does this appeal in any manner involve the substitution of this Court for the Supreme Court in any case wherein the Supreme Court is properly exercising its jurisdiction, and, if necessary, its own discretion under the Order in Council. Further, it ought to be noted that, though the discussion on both sides introduced the prerogative right of appeal from the Dominions, the issues we have to determine leave any direct solution of that difficult question unnecessary.

1. *The Issues.*—The essential problem we have necessarily to

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solve has divided itself into two branches: (1) Has the Commonwealth Parliament power by legislation to declare and has it declared that the rights and liabilities of the Commonwealth of Australia, *when a party to litigation arising under Federal jurisdiction* within the meaning of the Constitution, shall be finally determined in Australia, unless, in matters outside sec. 74 of the Constitution unaffected by legislation thereby permitted, His Majesty in Council allows an appeal as of grace; and (2) If so, does the Constitution confer upon this Court the necessary judicial power to enforce observance of that declaration so far as persons and parties in Australia are concerned, or is the Australian judicial power so fatally defective as to leave the Commonwealth powerless to protect itself in its own Courts, assuming there has been a direct breach of its own laws? The problem comes to us in a very acute form, arising out of an action at law and an application under the *Arbitration Act* of New South Wales.

2. *The Litigation.*—In one case, the *action*, a shipping company, the Limerick Steamship Co., sued the Commonwealth of Australia and William Scott Fell, trading as Scott Fell & Co., for what has been curtly described as "simply an action of trespass" but on examination is manifestly something much more serious and complicated.

There were two counts in the respondent's declaration (the procedure of New South Wales being under the *Common Law Procedure Act*). The first count was for seizure and detention and user of two ships causing loss; the second count was, in substance, for a conspiracy between the two defendants whereby the Commonwealth (that is, of course, in law His Majesty the King in right of his Commonwealth) wrongfully agreed to requisition certain vessels of the respondent and to omit the statutory duty of the Commonwealth to recompense the respondent. There was a plea (*inter alia*) that during the state of war the Commonwealth duly requisitioned the ships for naval and military purposes under statutory powers, and there were other pleas as to the statutory duty of the Commonwealth. The respondent's second replication averred "that the ships taken from it were not required bona fide or at all for naval or military purposes." In the respondent's fifth replication it

averred that " the defendants falsely pretended to take the plaintiff's ships under colour of a statutory authority to take ships required for naval or military purposes whereas the defendants had no such authority and the said ships were not required bona fide or at all for naval or military purposes," &c. Among the questions put to the jury were : (1) " Were these ships requisitioned in good faith by the Commonwealth Government for naval or military purposes ? " and (2) " Or were they requisitioned in pursuance of an agreement between the defendants that they should be requisitioned in order to enable the ships to be run in the interests of the defendant Scott Fell, subject to limitation of freight charges in the interests of the Broken Hill Companies ? " It is stated in the notice of appeal to the Supreme Court, where these questions are set out, that the jury answered them respectively in the negative and in the affirmative. That is to say, the jury found that the Crown in right of the Commonwealth was chargeable with bad faith in the execution in war-time of a Commonwealth statute passed for the defence of the Commonwealth, and therefore of the Empire, and that the requisition was in pursuance of a conspiracy to defraud the present respondent. It was admitted that the questions and answers were correctly set out. The proceeding, therefore, cannot be regarded as properly described in the judgment appealed from as " simply an action of trespass," or, as contended in argument before us, an action clearly of ordinary State jurisdiction.

The *second proceeding* is, as stated, of a different nature. In July 1918, that is, during the War, the Commonwealth Government entered into a contract with Kidman and Mayoh for the construction of six barquentines. On 19th August 1919 a further contract was made varying the first contract. On 29th November 1921 the contractors sued the Commonwealth in the High Court of Australia claiming £88,000. On 2nd April 1922 the Commonwealth cancelled the contracts as from that date. On 12th June 1922 the Commonwealth and the contractors agreed to stay the action pending the determination of the disputes by arbitration ; and those disputes were referred to the arbitrament of Sir Mark Sheldon. It was agreed, *inter alia*, in these words, by clause 4 : " The *Arbitration Act* 1902 of the State of New South Wales shall apply to proceedings in this

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arbitration but either party shall be at liberty to apply to the High Court in accordance with the provisions of sec. 33A of the *Judiciary Act* 1903-1920 for an order directing that the award shall be made a rule of the said Court." Sec. 33A, which is enacted by Act No. 38 of 1920, provides: "The High Court may by order direct that an award in an arbitration in respect of any matter over which the High Court has original jurisdiction, or in respect of which original jurisdiction may be conferred upon the High Court, shall be a rule of the High Court." Except for adopting contractually the machinery of the New South Wales *Arbitration Act* 1902, which contractual adoption in itself would not confer authority on the Supreme Court of that State, particularly in view of sec. 26, which includes the Crown within the ambit of the Act only so far as relates to the Government of the State, the clear intention of the parties was to stand upon Federal rights and Federal jurisdiction. This is shown on the face of the documents and beyond any reach of contrary argument by the retention of the action in the High Court, and by the provision as to sec. 33A of the *Judiciary Act*. If the Supreme Court could have jurisdiction it would be by submission to the Court's process itself, or by reason of sec. 39 (2) (*a*) conferring Federal jurisdiction and practically adopting the necessary procedure.

The contractors moved in the Supreme Court, by notice dated 1st May 1923, to set aside or remit back the award. The Commonwealth resisted it. Except under the jurisdiction conferred by sec. 39 of the *Judiciary Act*—that is, Federal jurisdiction—there has not been suggested any jurisdiction of the Supreme Court to make a coercive order on the Commonwealth under State law—and particularly under a statute that limited its application to the Crown as representing the State. But the Court dismissed that application on 31st May 1923, and, as appears from the report of the next mentioned motion in the *New South Wales State Reports* (1), there has been no appeal. Then the Commonwealth, entirely giving the go-by to the arrangement to proceed under sec. 33A of the *Judiciary Act* 1903-1920, applied to the Supreme Court of the State, not under any Federal Act, but by summons under

(1) (1923) 23 S.R. (N.S.W.), at pp. 594-595.

the New South Wales *Arbitration Act*, for an order to enforce the award as a judgment to the same effect. Why that course was taken we do not know. In *Lorenzo* v. *Carey* (1) it is said in the judgment of five Justices: "When Federal jurisdiction is given to a State Court and the jurisdiction which belongs to it is not taken away, we see no difficulty in that Court exercising either jurisdiction at the instance of a litigant." Still, we have to see if the jurisdiction "belonging" to the State Court had been taken away. Sec. 38 of the *Judiciary Act* did not take away the jurisdiction in this case. Nor did sec. 38A. But sec. 39 did, by sub-sec. 1, except as provided in that section, because by sec. 75 (III.) of the Constitution the High Court is given original jurisdiction in a matter such as this. It follows that, if sec. 39 is valid, the jurisdiction exercised by the Supreme Court on the motion in question was Federal jurisdiction.

3. *Section* 39 (2) (*a*)—*Construction.*—The decisions of the Supreme Court in these truly Federal matters were in favour of the Commonwealth. In rendering them the Supreme Court was unquestionably exercising Federal jurisdiction. Sec. 75 (III.) of the Constitution invests this Court with original jurisdiction in both matters. Sec. 77 enables the Parliament to make that jurisdiction exclusive of any jurisdiction of the State Supreme Court, even if it "belonged" to it previously, which in the case of a coercive process against the Commonwealth cannot be conceded, or if otherwise—as is the case—the Supreme Court were "invested" with the jurisdiction. Next, sec. 39 of the *Judiciary Act*, in exercise of the constitutional power mentioned, made the jurisdiction of this Court exclusive of that of the Supreme Court in these matters, except as far as that exclusion was expressly relaxed. The relaxation, however, was limited by "conditions and restrictions" including this: that the Supreme Court decision should be "final and conclusive except so far as an appeal may be brought to the High Court." So far as legislative intention can go, no words could be plainer to confine to Australian judiciary the ultimate determination of all matters arising in Federal jurisdiction, subject always to whatever appeal as of grace is permissible to His Majesty by virtue of his royal prerogative.

(1) (1921) 29 C.L.R., at p. 252.

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But it is on the face of the enactment clear, since the words "final and conclusive" are used in the section—just as they are in sec. 73 of the Constitution—that the Commonwealth Parliament intended that there should be no appeal as of right from the Supreme Court exercising the judicial power of the Commonwealth except to this Court and, of course, upon such terms as the law of Australia declared.

The Commonwealth, in this case, does not contend that the words "final and conclusive" go further than to preclude the appeal as of right to His Majesty in Council. The respondents and the intervenant (the State of Victoria) contend they do not go so far. It seems almost superfluous to adduce authority that these well-known words in such a context have the meaning contended for, whatever may be the legal power to enact them. Nevertheless it is proper, in view of the argument, to state the authorities which establish the Commonwealth's position on this point. The arguments included decisions on the word "conclusive" alone, the word "final" alone, and the complete phrase "final and conclusive." The word "conclusive" alone would not exclude an appeal unless the context clearly required it. Primarily "conclusive" means unchallengeable by the parties as long as it stands. Conclusive evidence is evidence that cannot be contradicted. But primarily the word does not import finality in the sense of precluding an appeal. *Minister for Lands* v. *Harrington* (1) is an example. "Final," on the other hand, has a distinct meaning of being "the last." But the context must determine to what in contradistinction the decision is to be "the last." If in contradistinction to "interlocutory," the word "final" has one application; if in contradistinction to further examination or review by a superior Court of any of the matters it determines, it imports that there is to be no appeal, though in certain circumstances this may not preclude a prerogative appeal. The following cases support this: *Modee Kaikhooscrow Hormusjee* v. *Cooverbhaee* (2); *Falkland Islands Co.* v. *The Queen* (3); *Attorney-General* v. *Sillem* (4); *Cushing* v. *Dupuy* (5); *Kennedy* v. *Purcell* (6); *Canadian Pacific Railway Co.* v. *Toronto Corporation* (7);

(1) (1899) A.C. 408.
(2) (1856) 6 Moo. Ind. App. 448, at p. 458.
(3) (1863) 1 Moo. P.C.C. (N.S.) 299, at p. 313.
(4) (1864) 10 H.L.C., at p. 776, per Lord *Kingsdown*.
(5) (1880) 5 App. Cas., at p. 416.
(6) (1888) 59 L.T. 279.
(7) (1911) A.C., at p. 471.

Albright v. *Hydro-Electric Power Commission of Ontario* (1). Before passing on, there is a sentence in *Kennedy* v. *Purcell* (2) which deserves quotation. There Lord *Hobhouse* says: "Again, the intention to confine the decision locally within the colony itself is just as clear as is the intention to get it passed speedily, because it is expressed that the decision of the Supreme Court should be final." Then as to the phrase "final and conclusive," that is not in all cases an expression of inflexible meaning. It may mean simply "final and unalterable in the Court which pronounced it" (per Lord *Watson* in *Nouvion* v. *Freeman* (3)). But, as the word "final" alone may as applied to a judgment be used "in the sense that it cannot be made the subject of appeal to a higher Court" (3), so the compound and more emphatic expression "final and conclusive" may and generally does mean finality as to a litigation. (See *In re Stronach* (4); and see *Daily Telegraph Newspaper Co.* v. *McLaughlin* (5) and *Victorian Railways Commissioners* v. *Brown* (6).)

4. *Section* 39 (2) (*a*)—*Validity.*—The meaning of sec. 39 (2) (*a*) being thus definitely established, its validity is disputed for two reasons. First, it is said, the power to invest a Court with Federal jurisdiction goes no further than the grant of power to decide. But, it is added, the power to prevent an appeal to another tribunal is something outside of and foreign to the conferred jurisdiction, and therefore—apart altogether from conflict with Imperial legislation or authority—the enactment is bad. And, as it is contended, the enactment is bad *in toto*—that is, that sec. 39 is wholly invalid. Next, it is urged, the Order in Council of 2nd April 1909, being made under the Imperial Act 9 Geo. IV. c. 83, sec. 15, cannot be overridden by the Commonwealth Act, and this, at all events, invalidates the provision.

The first contention overlooks some fundamental considerations. It takes all too narrow a view of the Federal Constitution as a great national instrument of government. It also mistakes the elements constituting effective appellate jurisdiction. Sec. 77 gives power to

(1) (1923) 2 D.L.R. 599, at p. 600 (P.C.).
(2) (1888) 59 L.T., at p. 281.
(3) (1889) 15 App. Cas. 1, at p. 13.
(4) (1838) 2 Moo. P.C.C. 311.
(5) (1904) A.C. 776.
(6) (1906) A.C. 381, at p. 382; 3 C.L.R. 1132.

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the Parliament with respect (*inter alia*) to the matters we are here concerned with, to make laws: (III.) "investing any Court of a State with Federal jurisdiction." Obviously a very convenient means of avoiding the multiplicity and expense of legal tribunals and of enabling this Court to devote itself more fully to appellate duties. But there are no words which make the power of investing a State Court with Federal jurisdiction any narrower than the power of defining the jurisdiction of a Federal Court. If the argument be right that sec. 39 (2) (*a*) is beyond the competency of Parliament, it follows that a similar incompetency would exist with reference to any new Federal Court. The result would be—as, indeed, admitted in argument—that Federal jurisdiction would be invested in Courts other than the High Court at the Commonwealth's peril. Either it must throw the whole judicial power upon the High Court, in order to maintain the principles of secs. 73 and 74, as to appeals to His Majesty in Council; or it must invest the jurisdiction in other Courts, with the consequence as to Federal Courts and all State Courts of a possible appeal as of grace even in constitutional matters *inter se*, and, as to the Supreme Courts, of that and also an appeal as of right. That would be a strange and fantastic result, and a most labyrinthine arrangement of judicial power. Having regard to sec. 74, divergent views of this Court and of the Privy Council, each binding on the Supreme Courts, would make the position hopeless. Happily that is not the outcome. What is included in "investing any Court of a State with Federal jurisdiction"—and this with special application to the Supreme Court?

Reference was made in argument to *Attorney-General* v. *Sillem* (1) as supporting the respondents' contention. It is, in reality, its most powerful refutation. The question was as to the power of the Court of Exchequer to create an appellate jurisdiction from itself to superior Courts. That power was contended for under the words "process, practice, and mode of pleading." The House of Lords negatived the contention, by three to two (Lords *Cranworth* and *Wensleydale* being in the minority). But, apart from the weight of the dissenting Judges, the Lord Chancellor (Lord *Westbury*) made some important observations which are entirely opposed to the respondents' view.

(1) (1864) 10 H.L.C. 704.

He said (1): "The creation of a new right of appeal is plainly an act which requires legislative authority." We may pause there for a moment to observe that there is a vast distinction between the ambit of curial power to make rules as to "process, practice, and mode of pleading," and the constitutional power of the Parliament of a great Dominion to legislate on the subject of Federal jurisdiction. Here there is legislation. But Lord *Westbury* proceeds to say:— "*The Court from which the appeal is given, and the Court to which it is given, must both be bound*, and that must be the act of some higher power. It is not competent to either tribunal, or to both collectively, to create any such right. Suppose the Legislature to have given to either tribunal, that is, to the Court of the first instance, and to the Court of error or appeal respectively, the fullest power of regulating its own practice or procedure, such power would not avail for the creation of a *new right of appeal*, which is in effect *a limitation of the jurisdiction of one Court*, and an extension of the jurisdiction of another." An Act "to regulate the *practice* of a Court does not involve or imply any power to alter the extent or nature of its jurisdiction. Accordingly it was necessary in the Act of 1854, not only to *give new rights of appeal*, but to define and bind *certain Courts to entertain* the appeals so given," &c. This is condensed in the following words (2): "An appeal is the *right* of entering a superior Court, and invoking its aid and interposition to redress the error of the Court below."

Before stating the conclusions which are inevitable from what *Westbury* L.C. there said, some later cases may with advantage be referred to, since they are clearly based on the same fundamental ideas as underlie Lord *Westbury's* judgment. In *Yeap Cheah Neo* v. *Ong Cheng Neo* (3) the distinction is preserved between "the power of appeal to His Majesty" and "the authority of the Court to grant leave to do so." In *Cushing* v. *Dupuy* (4) the Canadian Dominion Parliament, in legislating on insolvency, declared that the judgment of the Court of Queen's Bench of Quebec should be "final." The point now material is that the Judicial Committee held that the Dominion Parliament, having legislative

(1) (1864) 10 H.L.C., at p. 720.
(2) (1864) 10 H.L.C., at p. 724.
(3) (1875) L.R. 6 P.C. 381, at p. 397.
(4) (1880) 5 App. Cas. 409.

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authority over "insolvency," could abolish the right of appeal to the Sovereign in Council either as a civil right or as procedure within the Province which the Provincial Legislature had given. *Colonial Sugar Refining Co.* v. *Irving* (1) shows it was a civil right, and this is confirmed by *Canadian Pacific Railway Co.* v. *Toronto Corporation* (2). That indicates that a right of appeal to the Sovereign is not foreign to the jurisdiction of a Court or the power of the Legislature controlling the subject matter of that jurisdiction. In *E. W. Gillett & Co.* v. *Lumsden* (3) the Judicial Committee recognized the validity of an Act of Ontario providing that no appeal should lie to the King in Council unless the matter in controversy exceeded 4,000 dollars or unless the Ontario Court allowed it. On the ground that that Court had not admitted the appeal, the Judicial Committee held the appeal incompetent. *Colonial Sugar Refining Co.* v. *Irving* is a clear decision that an appeal to His Majesty in Council is a suitor's "right," and not merely procedure.

The result of these judicial pronouncements is this: that *an appeal is the continuous process of passing from one tribunal to another to correct the error of the first.* At one end of the process is the civil right of the suitor to make the appeal, and there is a corresponding obligation of the opposing litigant to abide by the result, and further there is by necessary connotation the duty of the first tribunal to conform to the opinion of the second tribunal. All that depends on the appropriate law of the locality of the first tribunal. At the other end of the process stands the appellate tribunal, dependent, for its powers and authority to entertain and pronounce upon the appeal, upon the appropriate law of its own locality. The respective appropriate laws may emanate from the same authority and from different authorities. But it is clear from Lord *Westbury's* words that a right of appeal from any Court is a limitation of that Court's jurisdiction. It lessens or may destroy the obligatory force of its orders; it delays or prevents execution of its decrees. It necessarily follows that the jurisdiction of a Court to decide and enforce finally and free from appeal is a larger jurisdiction than the jurisdiction to decide and enforce subject to an appeal. It is also clear—and the

(1) (1905) A.C. 369.
(2) (1911) A.C., at p. 471.
(3) (1905) A.C. 601.

above-cited case of *E. W. Gillett & Co.* v. *Lumsden* (1) is one illustration—that the local law at the initial end of the appeal process may so control *the civil rights of the litigants* that, though there is a tribunal at the other end equipped with full authority to discharge appellate functions, the continuity of appellate jurisdiction fails.

The authority of the Commonwealth Parliament to control the rights of litigants in Australia in Federal jurisdiction must be admitted; and, on the principles stated, that authority extends —subject to what prerogative exists—to investing the Supreme Court with Federal jurisdiction limited only by an appeal to the High Court.

Thus far, if we are free to decide the point and are not controlled by an opposite determination by the Privy Council in *Webb* v. *Outrim* (2). The respondents strenuously contend that that case concludes the matter and definitely holds that sec. 39 (2) (*a*) is invalid, and that the Commonwealth Parliament has no power to make the judgment of a State Court "final and conclusive" even in matters of undeniably Federal jurisdiction. When that case is carefully examined, it affords no ground for such a contention. On the contrary, when the *ratio decidendi* is considered, it rather looks the other way. The case has been referred to by Judges of this Court on several occasions, and as having held sec. 39 (2) (*a*) to be invalid. That is true; but invalid *as to what*? Never, before the present case, has the occasion called for so precise an examination of the decision; and it is obvious that no opinion of any tribunal other than the Judicial Committee can affect the force and extent of the decision itself as apparent on its face. It must now, on closer examination than it has yet received in this Court, speak for itself. The case arose out of a claim by the State of Victoria in the Victorian Supreme Court against a citizen of Victoria for income tax levied under a Victorian statute for State purposes. The defendant happened to be a Federal officer, and he claimed exemption from State income tax with respect to his official salary. Following, as he was bound to follow, a prior decision of this Court, *Hodges* J., who heard the case, entered judgment for the taxpayer. Then,

(1) (1905) A.C. 601.

(2) (1907) A.C. 81; 4 C.L.R. 356.

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quoting from the report in the *Law Reports* (1): "On 29th March 1905 *Hodges* J. granted leave to appeal to His Majesty in Council, holding that the Commonwealth *Judiciary Act* No. 6 of 1903, so far as it attempted to transfer any matter previously within the jurisdiction of a State Court to the category of Federal jurisdiction, was, notwithstanding sec. 77, sub-secs. 2 and 3, of the *Commonwealth Constitution Act* (63 & 64 Vict. c. 12) *ultra vires* of the Federal Parliament, and that an appeal still lay in such matter to the Privy Council as of right." That very fairly represents what *Hodges* J. held, that learned Judge being manifestly of opinion that there was no new element in the case when it was thoroughly examined which altered its character from State jurisdiction to Federal jurisdiction. Their Lordships first dealt with the main question. Lord *Halsbury* said (2): "The substantial question is whether the respondent, an officer of the Commonwealth, is liable to be assessed for income tax imposed by an Act of the Victorian Legislature in respect of his official salary, he being resident in Victoria, and his salary being received by him in that State." The reasoning of the learned Lord was that, there being no express limitation in the Constitution upon the power of the Victorian Parliament to impose taxation on those who are within the ambit of its authority, that authority was unrestricted, for the doctrine of implied prohibitions had no place in the Australian Constitution. Whether that was properly entertained or not, and whether or not the decision in *Deakin* v. *Webb* (3) was in law under sec. 74 of the Constitution a decision of the High Court that concluded the point, their Lordships considered the question of implied prohibition as a means, but only as a means, of ascertaining if the action was one of *State judicial power* into which no Federal question entered. They held it was, and that ended the matter, and left the case one of pure State and not Federal jurisdiction in accordance with what *Hodges* J. had held. Coming then to the objection to the hearing of the appeal, Lord *Halsbury* on that basis adopted the reasoning of *Hodges* J. In effect that reasoning was: "The Federal Parliament cannot take away from the State Courts matters of *purely State*

(1) (1907) A.C., at p. 82. (2) (1907) A.C., at p. 87.
(3) (1904) 1 C.L.R. 585.

jurisdiction attached to which there is an appeal to the King in Council, and then restore to the State Courts jurisdiction over the self same matters, but as Federal jurisdiction and shorn of the appeal to His Majesty." The view taken of the decision by Sir *William Anson* (*Law and Customs of the Constitution*, 3rd ed. (1908), vol. II., part 2, p. 290) is in accord with what has been said.

In substance there is nothing more in *Webb* v. *Outrim* (1) than that. It was not within the purview of their Lordships to consider such a case as the present, which never was, and never could be, within the purely State jurisdiction of the Supreme Court. It would be doing great injustice to the memory of the illustrious lawyers who composed the tribunal on that occasion to imagine they forgot the principles enunciated in *Hodge* v. *The Queen* (2) and *Attorney-General for Canada* v. *Cain and Gilhula* (3), and committed themselves to asserting that the Federal Parliament had no power —a power frequently conceded in less important matters to other Parliaments not of greater dignity—to make what was unquestionably Federal litigation, sometimes involving the construction of the Constitution and the distribution of Australian powers of self-government, "final and conclusive" in the proper sense, simply because the judicial instrument selected was a State Court, one of the three classes of Courts designated for the purpose by the Constitution itself. The decision referred to, therefore, has no relation to such a case as the present, or to any case where the jurisdiction exercised by the Supreme Court is found eventually to be not State jurisdiction but Federal jurisdiction.

The contention that sec. 39 (2) (*a*), if bad for no other reason, is invalid under the *Colonial Laws Validity Act* because in conflict with an Imperial Act allowing an appeal to His Majesty in Council, may be briefly dealt with. The Order in Council giving authority to the Supreme Court to admit an appeal to the Sovereign in Council is made under an Imperial statute; but so is the Commonwealth judiciary enactment, sec. 39 (2) (*a*). The contest being between the Act 9 Geo. IV. c. 83 or the Act 7 & 8 Vict. c. 69, on the one hand, and the *Commonwealth of Australia Constitution Act* (63 & 64

(1) (1907) A.C. 81; 4 C.L.R. 356. (2) (1883) 9 App. Cas. 117, at p. 132.
(3) (1906) A.C. 542, at p. 547.

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Vict. c. 12), on the other—which prevails? As this contention concedes the legislation to be within the powers granted by the Constitution Act—for otherwise it would have no meaning—the answer must be that, assuming two Imperial enactments conflict, the later must prevail.

There remains the question of the nature of the Supreme Court order granting leave to appeal.

5. *Appealability of the Supreme Court Order.*—The argument of the respondents on this branch, when summarized, is:—(a) The only appellate jurisdiction of the High Court over the Supreme Court is in respect of "judgments, decrees, orders, and sentences" of the latter Court. As to this no contest arises. (b) The orders of 26th February 1924, which, subject to the performance of certain conditions, granted leave to appeal to His Majesty in Council, are not "orders of the Supreme Court" within the meaning of sec. 73 of the Constitution. That they are "orders" is not denied; that they are made by the Supreme Court is not denied; that they are "orders of the Supreme Court" is not denied: but that they are "orders of the Supreme Court" within the meaning of sec. 73 is denied. The process of reasoning presented by the respondents may it is thought and without disadvantage to them be expressed as follows:—Though the orders are in fact, and, indeed, in law, orders of the Supreme Court, yet they are not made in the exercise of its own curial jurisdiction, but merely as the selected deputy *pro hac vice* of the King in Council and in the exercise of a jurisdiction appertaining by law only to His Majesty in Council, and which His Majesty in Council could, if so minded, exercise directly and without the intervention of the Supreme Court. Therefore, it is urged, an appeal against such orders would not really be against "orders of the Supreme Court" of New South Wales, but against orders of His Majesty in Council. It is difficult to find any legal support for such a contention. In the first place, it is inconsistent with sec. 73 of the Constitution. It also runs counter to the primary import of the orders, and of the Order in Council itself under which they are granted, and of the statute upon the authority of which the Order in Council is made, and, moreover, to the history of the present Order in Council and its predecessor. It is, moreover, opposed to

the general spirit of the British Constitution in its application to His Majesty's Dominions over Sea. As against these formidable obstacles no single precedent or dictum could be suggested, except cases like *Lane* v. *Esdaile* (1) and *Ex parte Stevenson* (2), where the language and the object of the Legislature and the nature of the subject matter were so different from the present case as to prevent the two being comparable.

The inconsistency of the contention with sec. 73 of the Constitution appears in this way:—That section in par. II., as shown in more detail hereafter, draws a clear distinction between appeals from (1) (other) "Court exercising Federal jurisdiction," which includes the Supreme Court exercising Federal jurisdiction, and (2) "the Supreme Court of any State," *simpliciter*, that is, exercising State jurisdiction. This is accentuated in the second limb of the section introduced by "But no exception," and especially in the last sentence of the section, which says: "Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court." Parliament has otherwise provided by sec. 35 of the *Judiciary Act*, and, since the Supreme Court and all other State Courts are by sec. 39 invested with Federal jurisdiction, sec. 35 makes provision both for "Federal jurisdiction or otherwise." But the point with reference to sec. 73 of the Constitution is: suppose Parliament had not made other provision and suppose the Supreme Court had made an erroneous order, as where it wrongly held the appealable amount was involved, could the High Court have entertained an appeal from that order? The final paragraph of sec. 73 adopts the "conditions of and restrictions on" appeals, as provided by the Orders in Council in each State, but it does not change the character in which the Supreme Court acts under the Order in Council. If the order for leave is not an ordinary curial act in the one case, it would not be so in the other. But can anyone imagine that, pending other provision by the Parliament, a Supreme Court order for appeal to the High Court would be either unchallengeable as an act of His Majesty in Council or challengeable only before the

(1) (1891) A.C. 210. (2) (1892) 1 Q.B. 609.

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Judicial Committee? Yet that is the impasse in which the respondents' contention is found. (Cf. *Yeap Cheah Neo* v. *Ong Cheng Neo* (1), referred to *infra*.) Whatever their inherent character, orders of the Supreme Court under the Orders in Council seem necessarily to come within the governing initial words "judgments, decrees, orders, and sentences" in sec. 73. That section is at once a *recognition* and an adoption of the ordinary judicial character of the relevant jurisdiction of the Supreme Court.

Then as to the orders of leave themselves. These, when looked at, do not purport to be orders of His Majesty in Council. After all the indicia in both orders by way of caption and recitals which would indicate that the application for leave to appeal to His Majesty in Council was made to the Supreme Court in its independent curial jurisdiction, one order—that in the arbitration—proceeds to say "This Court doth order," and so on in the usual way. The final direction is to suspend the execution of the order of "this Honourable Court." The order in the action is shorter but the words "it is ordered" and the expression "Prothonotary of this Court" indicate the ordinary exercise of judicial power by one of His Majesty's Courts. The Order in Council of 1909 not only refers to the Supreme Court of New South Wales in terms perfectly consistent with the powers being vested in it in the character of State tribunal and with those powers being so vested as additional to all others it possesses in that character, but there is no single word in the Order in Council which indicates that it is the King in Council which possesses those statutory powers or could exercise them in place of the Supreme Court, or that the Supreme Court is regarded as a mere deputy. There is a decision, *Yeap Cheah Neo* v. *Ong Cheng Neo*, which militates strongly against the respondents' view, that the leave once granted is to be taken as granted by or for the King in Council and to be unappealable. In the first report of that case the Judicial Committee granted (*inter alia*) leave to appeal against the refusal of the Supreme Court of the Straits Settlement to grant leave to appeal. In the second report their Lordships, referring to that refusal as "*this decision*" (2), held it to have been wrong in law. The Ordinance

(1) (1874) L.R. 5 P.C. 89; (1875) L.R. 6 P.C. 381.

(2) (1875) L.R. 6 P.C., at p. 397.

there (No. 5 of 1868) incorporated by reference the provisions of the letters patent of the Queen of 1855, and these provisions so incorporated could have no different meaning and effect than they had originally.

The fundamental reasoning of the matter is found in *R.* v. *Alloo Paroo* (1). There Lord *Brougham*, after dealing with the class of charter before the Commonwealth, points to another well-known class—the cases we are concerned with here; and from what he says (2) it is very clear that, up to the point where the Court is bound quasi-ministerially to grant the leave, it is acting as an independent tribunal, bound, no doubt, to act upon the rules of law laid down, but having judicial discretion within limits. It further appears from Lord *Brougham's* observations that the discretion of the colonial Court when given cannot be displaced by the discretion of the Judicial Committee. But, if not, that is fatal to the respondents' contention. It is at this point that *Lane* v. *Esdaile* (3) becomes relevant, if at all. When contesting the argument put forward on the strength of *Christian* v. *Corren* (4), his Lordship says (5) that in certain cases the Crown may, "by a particular mode of enactment in the Charter," "*delegate to my Judges below*, the right (the Crown may say) to refuse or to grant it, as they see fit." That is the ordinary case of the Crown *granting a Charter*, which, when granted, unless the prerogative is reserved, may, in some cases (as in *Alloo Paroo's Case* and in the preceding case of *R.* v. *Eduljee Byramjee* (6) and other cases—see *R.* v. *Bertrand* (7)), work an abandonment of the prerogative. It is the principle of *Campbell* v. *Hall* (8). For it must be borne in mind that prerogative in the true sense excludes the operation of a statute (see *Canadian Pacific Railway Co.* v. *Toronto Corporation* (9), *Bonanza Creek Gold Mining Co.* v. *The King* (10), *Theodore* v. *Duncan* (11), *Attorney-General* v. *De Keyser's Royal Hotel* (12) and *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (13)).

(1) (1847) 5 Moo. P.C.C. 296.
(2) (1847) 5 Moo. P.C.C., at p. 301.
(3) (1891) A.C. 210.
(4) (1716) 1 P. Wms. 329.
(5) (1847) 5 Moo. P.C.C., at pp. 303, 304.
(6) (1846) 5 Moo. P.C.C. 276.
(7) (1867) L.R. 1 P.C. 520.
(8) (1774) 20 St.Tr. 239, at pp. 328, 329.
(9) (1911) A.C. 461.
(10) (1916) 1 A.C. 566, at p. 587.
(11) (1919) A.C. 696, at p. 706; 26 C.L.R. 276, at p. 282.
(12) (1920) A.C. 508, at pp. 526, 539, 540, 562, 568, 575.
(13) (1920) 28 C.L.R. 129, at p. 143.

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To the extent of the operation of the statute, the prerogative is controlled. But, apart from that, the delegation to Judges of jurisdiction is the fundamental theory of the administration of British justice. *Chitty on the Prerogative* (at p. 75) points this out very distinctly, and applies it to the Privy Council at pp. 410 and 411. He was speaking in 1820; and it becomes still more evident since the Judicial Committee Acts. It was noted by Lord *Hardwicke* C. in *Penn* v. *Lord Baltimore* (1). In *John Russell & Co.* v. *Cayzer, Irvine & Co.* (2) Viscount *Haldane* observes: "The root principle of the English law about jurisdiction is that the Judges stand in the place of the Sovereign in whose name they administer justice." That principle, which is simply delegation, was applied there to solve one difficulty; here it helps to solve another. Once the Judges are entrusted with jurisdiction, it is *they* who decide and determine, according to the relevant law. For the historical application of this to the Privy Council, see *Macqueen's* disquisition on *The House of Lords and Privy Council*, pp. 671 *et seqq.*, particularly p. 680; *Safford and Wheeler's Privy Council Practice*, at p. 702, and *Anson on the Constitution*, 3rd ed., vol. II., pp. 286 *et seqq.*

The history of the jurisdiction of the Supreme Court of New South Wales to grant leave to appeal to the King in Council is enlightening. It begins with the Act 4 Geo. IV. c. 96, which empowered His Majesty to erect and establish by Charter or Letters Patent under the Great Seal a Court of Judicature in New South Wales to be styled the Supreme Court of New South Wales. On 13th October 1823, while that Act was in force, the *Charter of Justice* for New South Wales was granted. That is throughout a *legislative instrument*, made under the authority of, and effectuating the purpose of, the Act referred to. Its operative words are "grant, direct, ordain, and appoint," or "grant, ordain, and declare," or "grant, ordain, establish, and appoint," or other words of command. The Charter establishes the Supreme Court, directs who shall be the first Chief Justice, ordains his tenure, and enacts as to its jurisdiction, &c. Passing to appeals to His Majesty in Council, none are provided for from the Supreme Court. But provision is made in clause 19—again under direct authority of the Act—for such appeals from the

(1) (1750) 1 Ves. 444, at p. 447.

(2) (1916) 2 A.C. 298, at p. 302.

"Court of Appeals," which then consisted of the Governor and the Chief Justice. Those provisions need not be dwelt upon in great detail. It is sufficient to say that they are introduced by the words "We do hereby direct, establish, and ordain, that any person or persons may appeal to Us, Our Heirs and Successors, in Our or their Privy Council," &c. This is a legislative creation of an individual civil right in suitors. The conditions are stated, and then, if they are complied with, the "Court of Appeals *shall* and is hereby empowered either to direct," &c., and, if security is required and is given, "then, and not otherwise, the said Court of Appeals shall allow the appeal." *At that point*, and there only, the Court becomes "to a certain degree quasi-ministerial" (*R.* v. *Alloo Paroo* (1)). Altogether it is as clearly an ordinance of a legislative character as any statutory rules and regulations of the Crown or of a Court under the authority of an Act of Parliament can ever be. There is, by clause 20, the reservation of the prerogative, but only as to the Courts of Appeals. To that Charter (and once for all to the Orders in Council hereinafter mentioned) may be applied the words of Dr. *Lushington* in *R.* v. *Eduljee Byramjee* (2): "*It must be recollected that this is a case in which the Crown grants a Charter by virtue of an Act of Parliament, and that Charter, we conceive, must be considered as granted in the execution of the powers which were granted by that Act of Parliament.*" This is the same judicial principle as is stated so frequently and authoritatively in *De Keyser's Case*, at the pages quoted.

The Act under which the Charter was granted was repealed as from 1st March 1829 by sec. 39 of 9 Geo. IV. c. 83. That Act was of a general constitutional character. Before examining that Act, a few words are desirable in view of the argument as to what is meant by the State Constitution. In *McCawley's Case* (3) reference was made to this; and it was there stated that "the Supreme Court Acts of Queensland, though not contained in the document labelled 'Constitution,' are in a legal sense as much part of the Constitution of the State as the Acts relating to the State Parliament." That view was really at the root of the question before the Court, and

(1) (1847) 5 Moo. P.C.C., at p. 301. (2) (1846) 5 Moo. P.C.C., at p. 294.
(3) (1918) 26 C.L.R., at p. 52.

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may be taken to have had the approval of the Privy Council on appeal. So here, the Constitution of New South Wales is not confined to the Act No. 32 of 1902, which is intituled *The Constitution Act* 1902, and to its specific amendments. The *Colonial Laws Validity Act* 1865, for instance, would be excluded by such an argument, though, as explained in *McCawley's Case* (1), it is unquestionably part of the Constitution of New South Wales, because it contains some of the powers granted to that State to function as a political entity. The Charter of Justice also would be excluded, together with the Imperial Act 9 Geo. IV. c. 83, on which that Charter now depends. And the exclusion of the Act, would mean that the provision of sec. 15, providing for appeals to His Majesty in Council from the Supreme Court, would be no part of its Constitution. That is to say, the " right " of a New South Wales citizen to appeal to the King in Council (see *Tilonko* v. *Attorney-General of Natal* (2)) would be entirely outside the " constitutional " provisions of the State and, therefore, outside the sphere of self-government. The contention that supports this view is so retrogressive in the political development of the Empire, and so opposed to *McCawley's Case* and *Theodore* v. *Duncan* (3), that it may well be left with simple dissent. The Charter and sec. 15 of the Act 9 Geo. IV. c. 83 and the Order in Council, if it is to be regarded as having statutory force by reason of sec. 15 and endowing, as the Charter and the Act unquestionably endow, the great judicial organ of the State with powers not dependent on what may be termed incidental legislation of the State, are all part of the Constitution of the State. And, if so, it necessarily follows that the attempt by the State through its chief judicial organ to make a coercive order against the Commonwealth, or in any case of Federal jurisdiction, is an attempted exertion of State constitutional power to command, within the asserted domain of Commonwealth rights to be free from such command, and is in conflict also with the asserted exclusive domain of constitutional legislative power. Where contrary Commonwealth legislation already exists, there is actual conflict; but this, though presenting the matter more sharply and accentuating

(1) (1918) 26 C.L.R. 9.
(2) (1907) A.C. 93, at p. 94.
(3) (1919) A.C. 696; 26 C.L.R. 276.

the intrusion, is not necessary to the proposition (*Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1)).

The question, however, remains as to the character of the Order in Council, and that is now dealt with. The Act 9 Geo. IV. c. 83 was of a general constitutional character, and, among other things, enacted by sec. 2 that until further provision by Charter or Letters Patent was made the Supreme Court as already constituted should continue, except as altered by the Act itself. No further Charter or Letters Patent were issued, and the Supreme Court continued with such other jurisdiction as was given by various sections of the statute. Sec. 15 dealt with appeals to His Majesty in Council, and was in these terms: "And be it further enacted, that it shall and may be lawful for His Majesty, by the said Charters or Letters Patent respectively, or by any Order or Orders of His Majesty in Council, *to allow any person or persons feeling aggrieved* by any judgment, decree, order, or sentence of the said Supreme Courts respectively, to *appeal therefrom* to *His Majesty in Council*, in such manner, within such time, and under and subject to such rules, regulations, and limitations, as His Majesty, by any such Charters, or Letters Patent, or Order or Orders in Council respectively, shall *appoint and prescribe*." Three things are to be noted. One, that now it is appeal from the *Supreme Court*, the Court of Appeals having disappeared. Next, that the power is again of a legislative nature, exercisable either by Charter, Letters Patent, or Order in Council—*but the same power in each case*. A Charter is of course of a legislative nature. Lastly, the statutory power is conferred upon His Majesty by sec. 15 to confer on suitors the civil right of appeal. It is a right beyond any right existing at common law by virtue of the prerogative. This necessarily circumscribes any Order in Council made under it. From 1829 to 1845 no appeal took place from the Supreme Court to the Sovereign in Council. But in 1844, as appears from the report of *Flint* v. *Walker* (2), an application for leave was refused by the Supreme Court on the ground that it had no jurisdiction—the existing Charter applying only to the obsolete Court of Appeal and not to the Supreme Court. In 1845 a petition for leave as of grace

(1) (1917) A.C. 528; 24 C.L.R. 396.
(2) (1845-47) 5 Moo. P.C.C. 179, at pp. 189-193.

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was dealt with by the Judicial Committee, and, in the absence of any provision for application to the Supreme Court, was granted under the then recent Act, 7 & 8 Vict. c. 69. Lord *Brougham* observed upon the grievance. Judgment was given in 1847, and on 13th November 1850 by an Order in Council provision was made for appeals, as of right and at discretion, from decisions of the Supreme Court by application to that Court. The same observations—with the substitution of the words "it is hereby ordered" instead of "ordain," &c. (a change appropriate to the instrument)—are proper as to the legislative nature of the Order in Council. There is also the reservation of prerogative right. It is to be noted here that this Order in Council was made under the power of sec. 15 of the Act 9 Geo. IV. c. 83, which expressly mentioned the Supreme Court, it being apparently thought unnecessary to have resort to the Act of 1844. So the matter stood until the Commonwealth Constitution Act was passed in 1900.

It needs hardly to be said that the provision for appeals from the Supreme Court of New South Wales, as from the Supreme Court of every other State of Australia, had reference only to "judgments, decrees, orders, and sentences" which it rendered as "the Supreme Court of the State." Whatever jurisdiction it possessed and exercised as the Supreme Court of the State, whether such jurisdiction was derived directly from Imperial legislation or indirectly from competent local legislation, fell under the Order in Council of 1850. At the time that Order in Council was passed, there could have been no doubt (1) that the judgments, &c., rendered by the Supreme Court at common law or in equity or in its ecclesiastical jurisdiction were rendered as the Supreme Court of New South Wales, and in no sense as an Imperial Court distinct from the political organism known as the State of New South Wales; (2) that the substantive law it interpreted and enforced was *the law of New South Wales* either so declared by local legislation or made so by overriding Imperial legislation; and (3) its *jurisdiction to render its judgments, &c., was referable to the Imperial Act of 9 Geo. IV. c. 83 and any Imperial Act either directly amending or in effect supplementing it.*

But when the Commonwealth was established and a totally distinct political organism was created with legislative, executive and

judicial jurisdictions entirely separate and distinct from those of the States, though the geographical area largely coincided, a new feature in point of law arose. The *Commonwealth Federal jurisdiction* was not exercisable by State Courts unless they were legislatively invested with it. If so invested, they exercised it as judicial agents of the Commonwealth and as *part of the system of Federal Judicature* and not as a judicial organ of the State. The Commonwealth could not alter the Constitution of the State Court; it could only invest it with jurisdiction. But that jurisdiction could be invested as the Parliament pleased. The number of Judges to exercise it can be prescribed (sec. 79 of the Constitution). But the procedure and the practice to be observed in relation to Federal jurisdiction is incidental to the powers of the Federal Judicature and so within par. XXXIX. of sec. 51 of the Constitution. The ambit of the Order in Council of 1909 does not extend to embrace Federal jurisdiction. There are several reasons pointing to this. One reason is that it is made under the Act of 9 Geo. IV. c. 83, which contemplates the Supreme Court as territorially and politically confined to New South Wales. Another reason is that the reference in the preamble to New South Wales being "*a State of* the Commonwealth," and the limitation in the ordering clause to "appeals to His Majesty in Council from the *State* of New South Wales," indicate that that State is regarded as a political entity and the Supreme Court is regarded as acting for that political entity, and therefore that State jurisdiction only in the sense of non-Federal jurisdiction is intended. (So in the Queensland Order in Council of 18th October 1909 and the Victorian Order in Council of 23rd January 1911.) The Order in Council was, as is well known, the outcome of the Colonial Conference of 1907. That Conference established the Imperial Conference, and from it arose the practical recognition of the British Commonwealth of Nations, now an acknowledged legal concept with the undoubted but undefinable constitutional interrelation of its distinct constituent units. The geographical limits of each constituent unit are usually coincident with its exclusive political jurisdiction, but not always, as in Canada and Australia. With a consciousness of these important considerations, Lord Chancellor Loreburn, at the Conference of 1907, with reference to the resolution relating to Privy Council

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appeals, made some observations which are apposite here. They are found in the Commonwealth Parliamentary Paper (cd. 4047) reproducing the official minutes of proceedings of the Conference. At pp. 218-219 the Lord Chancellor's observations appear. It is enough to say here that by the words "if you will leave it to us we will send round to *the different colonies*" it would appear that each colony was then regarded as a political entity. Each Australian State one would expect to be included in the Lord Chancellor's words, but so would the Commonwealth, though the same geographical area would be covered twice. This was done. Reference was made in argument to a passage in *Bentwich on Privy Council Practice*, at p. 72, where it is said that on the Commonwealth protesting against the new rules of appeal the Colonial Office pointed out that the Commonwealth view was opposed to the principle laid down by the Privy Council in *Webb* v. *Outrim* (1), and took no notice of the alleged distinction in framing rules for the States of the Commonwealth which were issued after the protest. Learned counsel for the Commonwealth informed the Court that he was instructed the Commonwealth law authorities were not aware that such a communication had been made to the Commonwealth. Research, aided by a reference (*Parliamentary Paper*, cd. 5273, pp. 39-40) found in *Keith on Responsible Government*, at p. 883, discloses that a very powerful presentation of the views of the Commonwealth was made to the Colonial Office in February 1910 by Mr. Deakin, then Prime Minister of the Commonwealth. The Colonial Office wrote, as it appears, but to the Privy Council Office. The Privy Council replied to the Colonial Office, and an extract from that reply was forwarded to the Governor-General. But that the letter of the Colonial Office was transmitted to the Commonwealth Government, there is nothing to show. Nor does the letter of the Privy Council Office—so far as the printed extract informs us—deal with the legal contentions of the Colonial Office letter. The Colonial Office letter states it to be Lord Crewe's opinion that the Orders in Council referring to the States apply both to State and Federal jurisdiction, and that that is in accord with *Webb* v. *Outrim*. But the reason given is hard to follow. It is that the case lays down

(1) (1907) A.C. 81; 4 C.L.R. 356.

"that any alterations of the conditions of appeals from the State Court in the exercise of any jurisdiction, whether Federal or State, can only be made by Imperial or *local* legislation and cannot be carried out by an Act of the Federal Parliament." That is to say, though in Federal jurisdiction, the Commonwealth Parliament cannot, and the *State Parliament can*, control the conditions of appeals from the State Courts in the exercise of *the judicial power of the Commonwealth* (sec. 71 of the Constitution). Nothing but the most explicit decision of the Judicial Committee (where that is permissible in view of sec. 74) so determining could establish that as a legal proposition. In the absence of such a determination it is inconceivable that the Order in Council is a means marking out a side track by which, in Federal jurisdiction, even constitutional questions may be determined by State Courts and Privy Council, to the clear exclusion of the High Court. That would practically nullify the words "final and conclusive" in sec. 73 and the whole of sec. 74. Those provisions were not put in as procedure, nor for merely technical reasons. They embody a great principle. This Court, as was strenuously urged by Mr. Deakin, has in *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (1) determined the validity of sec. 39 (2) (*a*) in a sense which appertains to sec. 74 of the Constitution. It is part of the respondents' case here that that decision can be overruled even without consulting the High Court. If, contrary to what is believed, there be ambiguity in the text of the Constitution, then Lord *Loreburn's* words in *Attorney-General for Ontario* v. *Attorney-General for Canada* (2), partly quoted in the majority judgment of this Court in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (3), are in point. Lord *Loreburn* said :—"In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power

(1) (1907) 4 C.L.R., at pp. 1138 *et seqq.* (2) (1912) A.C. 571, at p. 583.
(3) (1920) 28 C.L.R., at p. 150.

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within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself (as, for example, a power to make laws for some part of His Majesty's dominions outside of Canada) or otherwise is clearly repugnant to its sense." The High Court, if the respondents' contention be adopted, would, without being consulted and without any opportunity of placing its views on record, find a decision of the Privy Council in some cases binding it and in others, though not binding it, certainly most embarrassing when it might be dealing with constitutional questions. The considerations that impressed the Judicial Committee in *Whittaker* v. *Durban Corporation* (1) would certainly not be overlooked when the Order in Council was framed.

All must gladly and gratefully welcome the opportunity of having the final opinion of that illustrious tribunal the Judicial Committee of the Privy Council, which, as *Bentwich* rightly observes, "has been well called 'the most august Court ever known,'" on all questions of common import, questions not especially "Australian," and particularly questions not relating to the local distribution of the totality of Australian powers of self-government. On all general questions, including even some questions of a constitutional nature having a general import (see *Theodore* v. *Duncan* (2), *McCawley's Case* (3), *Commercial Cable Co.* v. *Newfoundland Government* (4), *Mackay* v. *Attorney-General for British Columbia* (5), *Auckland Harbour Board* v. *The King* (6) and others), it must be recognized how much that tribunal has of late years done, and is daily doing, to stabilize and harmonize the fundamental law of the Empire, to find and enforce the basic principles of jurisprudence on which modern civilization rests, and to assist the development of free institutions in the constitutional units of the British Commonwealth of Nations. But there is a point where the self-government

(1) (1920) 36 T.L.R. 784.
(2) (1919) A.C. 696.
(3) (1920) A.C. 691.
(4) (1916) 2 A.C. 610, at pp. 616, 617.
(5) (1922) 1 A.C. 457.
(6) (1924) A.C. 318, at p. 326.

of Australia as marked out in the Federal Constitution became, not a general, but an essentially local question. That point is certainly reached in this case. If the Order in Council were to extend effectively so far as the respondents suggest, that point would be passed, the finality and conclusiveness of the decisions of this Court contemplated by sec. 73 and the provisions of sec. 74 would be little more than nominal. That would profoundly change the Constitution. Indeed, the High Court of Australia would be but an expensive luxury, if not an almost useless and unjustifiable encumbrance to the people of Australia. It would not be even a half-way house on the most vital questions that concern them as a nation. This, we may be sure, is not the intended effect of the Order in Council of 1909; but, unless that is the effect, it cannot have any application whatever to Federal jurisdiction, and that conclusion would in itself be enough to dispose of the respondents' contention. Even, however, if on its bare interpretation it should be construed as extending so far, it still has to meet the test of conflicting Imperial Acts, for the competing documents have ultimately to be referred to the Acts (*Powell* v. *Apollo Candle Co.* (1)), just as the Charter of Justice itself has to be referred to its supporting Act. The Order in Council declares that it is expedient that " His Majesty's subjects in the British Dominions beyond the Seas shall have a right of appeal to His Majesty in Council," &c., and then proceeds to make " Rules . . . to regulate all appeals," &c. That is obviously *legislation* by statutory Order in Council *creating a civil right*, and made under *earlier Acts*. The second rule creates the civil right of the suitor to an appeal as of right, in some cases by discretion. The Court's authorized and, indeed, compulsory judicial action in certain cases is entirely dependent on the existence of the civil right. That must all give way to Commonwealth legislation equally authorized under the later and overriding Imperial Act of 1900. This also ends the respondents' contention.

The appeals should, therefore, be allowed, and the Supreme Court orders granting conditional leave discharged as made without jurisdiction and wholly unauthorized by law.

(1) (1885) 10 App. Cas. 282.

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STARKE J. These are appeals on the part of the Commonwealth, and also on the part of Scott Fell in the matter to which he is a party, by the special leave of this Court, from orders of the Supreme Court of New South Wales giving leave to appeal to His Majesty in Council —in the case of the Limerick Steamship Co., against an order setting aside the verdict of a jury and entering judgment for the Commonwealth and Scott Fell, and, in the case of Kidman and others, against an order granting leave to enforce an award made on a submission to arbitration in the same manner as a judgment of the Court.

The Limerick Steamship Co. sued the Commonwealth and Scott Fell in the Supreme Court, and declared upon two counts, alleging in the first that the defendants seized and took the plaintiff's ships, and kept and used them for a long time, whereby the Company was deprived of the use of them and was otherwise damnified, and in the second that the Commonwealth, at the instance and instigation of Scott Fell, requisitioned the plaintiff's ships under the *Defence Act*, intending thereby to benefit Scott Fell and certain companies and to deprive the plaintiff of the use and possession of its ships, without recompensing the plaintiff in the manner required by the *Defence Act*. A verdict was found for the plaintiff on the trial of this action for £19,480, but it was set aside by the Full Court and judgment entered for the defendants. Leave to appeal to His Majesty in Council from this judgment was obtained by the plaintiff from the Supreme Court by an order dated 26th February 1924, and from this order an appeal, by special leave, has been brought to this Court by the Commonwealth and Scott Fell.

Kidman and others entered into an agreement with the Commonwealth dated 12th June 1922, whereby certain disputes between the parties were referred to arbitration, and it was agreed that the *Arbitration Act* 1902 of the State of New South Wales should apply to the proceedings in the arbitration. An award was made on 30th June 1922, and Kidman and others moved the Supreme Court of New South Wales to set aside the award or remit it back to the arbitrator. The motion was refused. Subsequently the Commonwealth applied to the Supreme Court and leave was given, pursuant to the *Arbitration Act* 1902, to enforce the award in the same manner

as a judgment of the Court. Kidman and others then moved the Supreme Court for leave to appeal to His Majesty in Council against this order, and obtained an order dated 26th February 1921 enabling them to do so. From this order an appeal has been brought to this Court, by special leave, by the Commonwealth.

It is essential, in the first place, to determine whether this Court can entertain the appeals made to it—whether they are competent. This question depends upon the nature of the authority and jurisdiction conferred upon the Supreme Court of New South Wales. "The King in virtue of his prerogative has," as *Bentwich* says (*Privy Council Practice*, p. 36), "authority to review the decisions of all colonial Courts and all Courts on which British jurisdiction has been conferred, whether the proceeding be of a civil or criminal character, unless His Majesty has parted with such authority." In such cases leave to appeal is sought as an act of grace. But, in addition, His Majesty has issued, "either by virtue of the royal prerogative or in pursuance of enabling statutes," Orders in Council granting an appeal as of right in certain cases, and at discretion in other cases. And authority has been conferred upon the Supreme Courts of the British possessions to give leave to appeal in accordance with the terms of the grant. Again, some of the self-governing possessions have, in virtue of other constitutional powers, granted rights of appeal to His Majesty in Council, and given jurisdiction and power to their own Courts to give the necessary leave. An instance may be found in the *Supreme Court Act* 1915 of Victoria, sec. 232; and see *Goldring v. La Banque d'Hochelaga* (1); *E. W. Gillett & Co.* v. *Lumsden* (2). The appeal in all these cases is by right of grant, and the jurisdiction and power of the local Courts is limited by the grant. Even if leave to appeal has been given by the local Courts, still that "does not make the thing right if it ought not to have been done" (*Macfarlane* v. *Leclaire* (3); *Sauvageau* v. *Gauthier* (4); *Allan* v. *Pratt* (5); *Goldring* v. *La Banque d'Hochelaga*; *E. W. Gillett & Co.* v. *Lumsden*), and their decisions may be reviewed by competent authority. Clearly, in the case of the Acts of the self-governing

(1) (1880) 5 App. Cas. 371.
(2) (1905) A.C. 601.
(3) (1862) 15 Moo. P.C.C. 181.
(4) (1874) L.R. 5 P.C. 494.
(5) (1888) 13 App. Cas. 780.

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possessions, e.g., the *Supreme Court Act* 1915 of Victoria, this jurisdiction and power is vested in the local Court as a judicial organ of the possession and not as a delegate or substitute or subrogate, as was suggested, of His Majesty. But in the present case we must examine the Order in Council. It is in the model form prepared after the Imperial Conference of 1907. Some of these Orders have been issued under the *Privy Council Appeal Act* 1844 (7 & 8 Vict. c. 69), as in the case of Victoria, but the New South Wales Order was issued pursuant to the powers contained in the statute 9 Geo. IV. c. 83, sec. 15, enabling His Majesty to allow "any person or persons feeling aggrieved by any judgment, decree, order, or sentence of the" Supreme Court of New South Wales "to appeal therefrom to His Majesty in Council, in such manner, within such time, and subject to such rules, regulations, and limitations, as His Majesty by any such Order or Orders in Council . . . shall appoint and prescribe." The Order in Council grants an appeal to His Majesty (*a*) as of right from any final judgment of the Supreme Court where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards, &c.; (*b*) at the discretion of the Supreme Court in certain other cases. And it authorizes the Supreme Court to give leave to appeal (rules 4, 5 and 18). Clearly this is not the prerogative power of His Majesty to grant leave to appeal as an act of grace, for that is reserved by rule 28 of the Order in Council. But if not, then it is a grant of power and jurisdiction to the judicial organ of the State, pursuant to the authority contained in the Act 9 Geo. IV. c. 83. It is as much a grant of jurisdiction to the Supreme Court as is the grant contained in the Act 9 Geo. IV. c. 83, sec. 3, itself. The nature of the power and jurisdiction conferred by the Order in Council upon the Supreme Court is clearly judicial. The Court must investigate and determine under rule 2 (*a*), whether the appeal is of right, that is, whether the appealable amount has been established, and, under rule 2 (*b*), whether the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty for determination. The Judicial Committee has repeatedly, as already noticed, reviewed orders establishing a right of appeal, which, I apprehend, would be incompetent unless the orders were

judicial in character (*Moses* v. *Parker* (1); *Hemchand Devchand* v. *Azam Sakarlal Chhotamlal* (2)). It does not necessarily follow, however, that the discretionary power to grant leave to appeal under rule 2 (*b*) of the Order in Council is subject to review. It may be that this rule, properly construed, constitutes the Supreme Court "the sole and final judges of the question" whether the appeal should be admitted (*Lane* v. *Esdaile* (3)) in all cases in which Federal jurisdiction is not involved. But I need not consider this matter, for the appeals to His Majesty in the cases now under consideration were as of right or else ought not to have been allowed by the Supreme Court, for reasons which must be examined at a later stage. The only relevant consideration at present is that an authority or jurisdiction has been conferred upon the Supreme Court to make orders giving leave to appeal and that these orders are judicial in their character. The orders in these cases are judicial both in form and in substance. In form the Supreme Court orders that leave to appeal be given; in substance the right of the party to appeal to His Majesty under the Order in Council is determined and declared. Unless the Order in Council, according to its true construction, constituted the Supreme Court "the sole and final judge" of the right of appeal, then the Constitution, sec. 73, is explicit: "The High Court shall have jurisdiction . . . to hear and determine appeals from all judgments, decrees, orders, and sentences . . . of the Supreme Court of any State." Properly construed, the Order in Council does not make the Supreme Court the sole and final judge of the question whether an appeal should be allowed as of right. *Macfarlane* v. *Leclaire* (4) and the other cases already cited are conclusive, in my opinion, upon the point. The appeals against the orders now before us are, therefore, competent.

Consequently, the grounds upon which the appeals in these cases are based must be considered. The argument on the part of the appellants is that the Supreme Court was exercising Federal jurisdiction in entering judgment for the defendants in the *Limerick Case*, and in giving leave to enforce the award in the same manner

(1) (1896) A.C. 245.
(2) (1906) A.C. 212.
(3) (1891) A.C., at p. 216.
(4) (1862) 15 Moo. P.C.C. 181.

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as a judgment of the Supreme Court in the *Kidman Case*, and that the *Judiciary Act*, sec. 39 (2) (*a*), made these decisions of the Supreme Court final and conclusive, except in so far as an appeal might be brought to this Court. Federal jurisdiction means authority to exercise the judicial power of the Commonwealth (*Ah Yick* v. *Lehmert* (1); *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (2)). That power is both appellate (The Constitution, sec. 73) and original (secs. 75 and 76). But the Parliament may define the extent to which the jurisdiction of any Federal Court shall be exclusive of that which belongs to, or is invested in, the Courts of the States, and may invest any Court of a State with Federal jurisdiction. By force of sec. 75 of the Constitution Federal jurisdiction is conferred upon the High Court "in all matters . . . in which the Commonwealth . . . is a party" (*Commonwealth* v. *State of New South Wales* (3)). And that jurisdiction is made exclusive of that which belongs to, or is invested in, the Courts of the States, except as provided in sec. 39 of the *Judiciary Act* 1903-1920. But the section goes on to invest with Federal jurisdiction the Courts of the States in all matters in which the High Court has original jurisdiction subject to the exception mentioned therein (*Baxter* v. *Commissioners of Taxation* (*N.S.W.*); *Lorenzo* v. *Carey* (4)). The constitutional validity of the provisions of that section, other than that contained in sub-sec. 2 (*a*), has been authoritatively established in this Court in those cases. But in deference to the opinion expressed by the Judicial Committee in *Webb* v. *Outrim* (5), this Court has not, heretofore, expressed its view of the operation and effect of sub-sec. 2 (*a*). The observations in *Dalgarno* v. *Hannah* (6) may suggest the principle, but they were directed to the provisions of sec. 73 of the Constitution.

Now, sec. 39, sub-sec. 2, provides that the Federal jurisdiction invested in the Courts of the States, pursuant to that section, is subject to the following condition and restriction: (*a*) "Every decision of the Supreme Court of a State . . . shall be final and conclusive except in so far as an appeal may be brought to the

(1) (1905) 2 C.L.R. 593.
(2) (1907) 4 C.L.R., at pp. 1141-1142.
(3) (1923) 32 C.L.R. 200.
(4) (1921) 29 C.L.R. 243.
(5) (1907) A.C. 81; 4 C.L.R. 356.
(6) (1903) 1 C.L.R., at p. 10.

High Court." That, of course, refers to decisions in matters within the Federal jurisdiction invested in the Courts of the States, and has nothing to do with the decisions in jurisdictions that otherwise belong to them. It is said, however, that though the jurisdiction invested in the Courts of the States be Federal, still that can "make no difference to the terms of the Orders in Council granting the right to appeal on certain conditions" from the Supreme Courts of the States (see *Responsible Government in the Dominions*, by *A. B. Keith*, vol. II., pp. 882-883; *Privy Council Practice*, by *Norman Bentwich*, p. 72). That proposition is the crux of this case. It depends upon the content of the authority granted by the Parliament under sec. 77 of the Constitution to make laws investing any Court of a State with Federal jurisdiction in respect of matters mentioned in secs. 75 and 76. These sections throw some light, I think, upon the question. There is no appeal as of right to His Majesty in Council from an exercise of original jurisdiction by the High Court under sec. 75. An appeal from any Justice, or Justices, exercising that jurisdiction is, with such exceptions as the Parliament prescribes, to the High Court under sec. 73, "and the judgment of the High Court" is "final and conclusive." It is true that His Majesty may, as an act of grace and subject to the provisions of sec. 74 of the Constitution, grant special leave to appeal from the High Court to His Majesty in Council; but there is no appeal as of right. So in respect of original jurisdiction conferred upon the High Court pursuant to sec. 76, there can be no appeal as of right to His Majesty, but only as of grace in matters that are not prohibited by sec. 74. Then sec. 77 prescribes that with respect to any of the matters mentioned in secs. 75 and 76 "the Parliament may make laws . . . investing any Court of a State with Federal jurisdiction"; and sec. 51 that "the Parliament shall . . . have power to make laws for the peace, order, and good government of the Commonwealth with respect to . . . (XXXIX.) matters incidental to the execution of any power vested by this Constitution in the Parliament." The power to invest or clothe a Court with jurisdiction coupled with the incidental power, which in any case is implied, enables the legislative authority, in my opinion, to make that jurisdiction exclusive, and final and conclusive, subject, of course, to overriding or paramount

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legislation. The jurisdiction may be so conferred in express terms, but the same result may be achieved by prohibiting appeal whereby in effect the ambit of jurisdiction is delimited and marked out (*Attorney-General* v. *Sillem* (1)). But if the legislative authority is empowered to go so far under such a grant, then it may allow some appeals and restrict others subject to any overriding or paramount legislation. There is no overriding or paramount legislation in the present case, for the Orders in Council under the Act 9 Geo. IV. c. 83, and the *Privy Council Appeal Act*, have no higher source than legislation under the Constitution. Imperial legislation is the source both of the Orders in Council and of the *Judiciary Act*. And the Constitution is the later expression of the legislative intent of the Parliament of the United Kingdom. Now, all that the Parliament of the Commonwealth has done in sec. 39, sub-sec. 2 (*a*), is to allow an appeal to the High Court and to restrict any appeal as of right to His Majesty in Council. Apart from authority, that, in my opinion, is within the legislative authority of the Parliament of the Commonwealth. It would be strange, indeed, that an appeal as of right could not be brought to His Majesty in Council from any Federal Court exercising Federal jurisdiction, but that such an appeal could be brought, in many cases, if the same matters were brought before what may be called the substitute tribunals, namely, the Courts of the States invested with Federal jurisdiction. Such a result is opposed, I think, to the reasonable intendment of the Constitution. Cases, of which *Cushing* v. *Dupuy* (2) is an example, were much relied upon during argument, but all recognize the proposition that an appeal to His Majesty in Council, whether of right or of grace, may be withdrawn by the Legislatures of the Dominions by appropriate words if the necessary authority has been conferred upon them. So, as already mentioned, the question here is, what is the content of the power conferred by sec. 77 (III.) of the Constitution, and to what extent has it been exercised? At this point *Webb* v. *Outrim* (3) requires consideration. It is said to establish conclusively the invalidity of sec. 39 (2) (*a*) of the *Judiciary Act*. In that case an attempt was made, as *Hodges* J.

(1) (1864) 10 H.L.C. 704.
(2) (1880) 5 App. Cas. 409.
(3) (1907) A.C. 81; 4 C.L.R. 356.

said (1), by the State of Victoria "to tax a . . . resident in the State in respect of income earned in the State" but paid to him by the Commonwealth as one of its officers. "And in such a matter," as *Hodges* J. remarked, "the Supreme Court of the State would prima facie have jurisdiction as a State Court." But in *Deakin* v. *Webb* (2) this Court had held that an attempt on the part of a State to tax the salaries of officers of the Commonwealth was an interference with the free exercise by the Commonwealth of its legislative and executive power, and impliedly prohibited by the Constitution. Consequently, Outrim claimed and was entitled to exemption from the State taxation in respect of his salary. But the Commissioner of Taxes obtained leave to appeal as of right to His Majesty in Council, and objection to the competence of his appeal was taken by the Commonwealth, which had intervened in the proceedings. It was decided that the appeal was competent; and in the course of its decision the Judicial Committee dissented from the doctrine of *Deakin* v. *Webb*. Since the decision of the Judicial Committee in *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (3), one may be permitted to doubt whether that question was open to their Lordships, in view of the provisions of sec. 74 of the Constitution. The decision of the High Court upon any question as to the limits *inter se* of the constitutional power of the Commonwealth and those of any State or States is the law with regard to that question, and is binding upon all tribunals until otherwise declared by the High Court or unless the High Court certify that the question is one which ought to be determined by His Majesty in Council (*Baxter's Case* (4)). The conflict of opinion which arose in the cases of *Webb* v. *Outrim*, *Deakin* v. *Webb* and *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) has now, however, been resolved in accordance with the view adopted by their Lordships in *Webb* v. *Outrim* (see *Engineers' Case* (5)). But the truth of the matter is that Federal jurisdiction was not and could not have been invoked in *Webb* v. *Outrim*. Outrim claimed exemption from State taxation by reason of an implied prohibition in the Constitution.

(1) (1905) V.L.R. 463, at p. 465; 26 A.L.T., at p. 198.
(2) (1904) 1 C.L.R. 585.
(3) (1917) A.C. 528; 24 C.L.R. 396.
(4) (1907) 4 C.L.R., at pp. 1116-1151.
(5) (1920) 28 C.L.R. 129.

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But the authority of the State Court to adjudicate upon that question was not derived from the Constitution, or the laws made under it, but from the provisions of the *Supreme Court Act* 1915, sec. 15, or the corresponding prior enactments. The question arose out of, or by reason of, the Constitution, which, as well as laws made under it, are binding on the States and on the Supreme Court (*Constitution Act*, sec. V.), but the duty to enforce the provisions of the Constitution was not in *Webb* v. *Outrim* (1) an exercise of Federal jurisdiction. It was simply a necessary concomitant of the Court's jurisdiction as a State Court to hear and dispose of a case or controversy properly before the Court according to the test and measure of the law (*Adkins* v. *Children's Hospital* (2)). Consequently *Webb* v. *Outrim* does not, upon examination, establish, as has been generally assumed, the invalidity of sec. 39, sub-sec. 2 (*a*) of the *Judiciary Act*.

The only question remaining is whether the Supreme Court of New South Wales was, or was not, exercising Federal jurisdiction in the *Limerick and Kidman Cases*. So far as the *Limerick Case* is concerned the matter seems clear. The Commonwealth was a defendant in the cause or matter. But the only jurisdiction or authority which the Supreme Court could exert over the Commonwealth must be derived from the Constitution or the laws made under it, and as part of the judicial power of the Commonwealth invested in it (The Constitution, secs. 71-78). So far as that jurisdiction or authority exists, it is to be found in secs. 39 and 56 of the *Judiciary Act*. These sections invest the Supreme Courts of the States with Federal jurisdiction in cases in which the Commonwealth is a party. But it is invested jurisdiction, and is by force of sec. 39 (2) subject to the restriction against appeal contained in sub-sec. 2 (*a*). The *Kidman Case* is more difficult. Here the Commonwealth was the moving party and claimed the benefit of a State Act. Cases such as *United States of America* v. *Wagner* (3) show that foreign States may claim the exercise of the authority and jurisdiction of the Courts of His Majesty in protection of their rights (see also *Foote's International Jurisprudence*, 3rd ed., pp. 150-153).

(1) (1907) A.C. 81; 4 C.L.R. 356. (2) (1923) 261 U.S. 525, at p. 544.
(3) (1867) L.R. 2 Ch. 582.

So too, the Commonwealth on similar principles might claim in some form, I apprehend, the exercise of the authority and jurisdiction of the Supreme Courts of the State in protection or enforcement of its rights. But for the provision of sec. 39 of the *Judiciary Act* I should have thought the Commonwealth appealed to the State and not to the Federal jurisdiction of the Supreme Court. That section, however, in effect, provides (sub-sec. 1) that in all matters in which the Commonwealth is a party the jurisdiction of the High Court "*shall be exclusive* of the jurisdiction of the several Courts of the States." Those Courts are, therefore, deprived of all jurisdiction in such cases. But they are then, by sub-sec. 2, *invested or clothed with Federal* jurisdiction within the limits of their several jurisdictions whether such limits are as to locality, subject matter or otherwise. Consequently the Supreme Court in giving leave to enforce the award of an arbitrator must have acted pursuant to the Federal jurisdiction invested in it, and its order then falls within the restriction as to appeal contained in sec. 39 (2) (*a*).

My opinion, therefore, is that these appeals must be allowed and the orders giving leave to appeal to His Majesty in Council discharged.

Appeals allowed. Orders of Supreme Court discharged. Respondents to pay costs of appeals.

Solicitors for the appellants, *Gordon H. Castle*, Crown Solicitor for the Commonwealth; *Minter Simpson & Co.*

Solicitors for the respondents, *A. J. McLachlan & Co.*; *Lambton & Milford.*

Solicitor for the intervener, *E. J. D. Guinness*, Crown Solicitor for Victoria.

B. L.